

104

ROLE OF CONGRESS IN MONITORING ADMINISTRATIVE RULEMAKING

Y 4. J 89/1:104/93

Role of Congress in Monitoring Admi...

HEARING

BEFORE THE

SUBCOMMITTEE ON

COMMERCIAL AND ADMINISTRATIVE LAW
OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

H.R. 47, H.R. 2727, and H.R. 2990

SEPTEMBER 12, 1996

Serial No. 93



Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

35-669 CC

WASHINGTON : 1996

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-053842-4

104

ROLE OF CONGRESS IN MONITORING ADMINISTRATIVE RULEMAKING

Y 4. J 89/1:104/93

Role of Congress in Monitoring Admi...

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

H.R. 47, H.R. 2727, and H.R. 2990

SEPTEMBER 12, 1996

Serial No. 93



Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

35-669 CC

WASHINGTON : 1996

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402

ISBN 0-16-053842-4

COMMITTEE ON THE JUDICIARY

HENRY J. HYDE, Illinois, *Chairman*

CARLOS J. MOORHEAD, California

F. JAMES SENSENBRENNER, Jr.,
Wisconsin

BILL McCOLLUM, Florida

GEORGE W. GEKAS, Pennsylvania

HOWARD COBLE, North Carolina

LAMAR SMITH, Texas

STEVEN SCHIFF, New Mexico

ELTON GALLEGLY, California

CHARLES T. CANADY, Florida

BOB INGLIS, South Carolina

BOB GOODLATTE, Virginia

STEPHEN E. BUYER, Indiana

MARTIN R. HOKE, Ohio

SONNY BONO, California

FRED HEINEMAN, North Carolina

ED BRYANT, Tennessee

STEVE CHABOT, Ohio

MICHAEL PATRICK FLANAGAN, Illinois

BOB BARR, Georgia

JOHN CONYERS, Jr., Michigan

PATRICIA SCHROEDER, Colorado

BARNEY FRANK, Massachusetts

CHARLES E. SCHUMER, New York

HOWARD L. BERMAN, California

RICK BOUCHER, Virginia

JOHN BRYANT, Texas

JACK REED, Rhode Island

JERROLD NADLER, New York

ROBERT C. SCOTT, Virginia

MELVIN L. WATT, North Carolina

XAVIER BECERRA, California

ZOE LOFGREN, California

SHEILA JACKSON LEE, Texas

MAXINE WATERS, California

ALAN F. COFFEY, Jr., *General Counsel/Staff Director*

JULIAN EPSTEIN, *Minority Staff Director*

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

GEORGE W. GEKAS, Pennsylvania, *Chairman*

HENRY J. HYDE, Illinois

BOB INGLIS, South Carolina

STEVE CHABOT, Ohio

MICHAEL PATRICK FLANAGAN, Illinois

BOB BARR, Georgia

JACK REED, Rhode Island

JERROLD NADLER, New York

ROBERT C. SCOTT, Virginia

ZOE LOFGREN, California

RAYMOND V. SMITANKA, *Chief Counsel*

CHARLES E. KERN II, *Counsel*

ROGER T. FLEMING, *Counsel*

AGNIESZKA FRYSZMAN, *Minority Counsel*

CONTENTS

HEARING DATE

September 12, 1996	Page 1
--------------------------	-----------

TEXTS OF BILLS

H.R. 47	2
H.R. 2727	4
H.R. 2990	12

OPENING STATEMENT

Gekas, Hon. George W., a Representative in Congress from the State of Pennsylvania, and chairman, Subcommittee on Commercial and Administrative Law	1
-----------------------------------------------------------------------------------------------------------------------------------------------------------	---

WITNESSES

Brewster, Hon. Bill K., a Representative in Congress from the State of Oklahoma	53
Gellhorn, Ernest, a professor of law, George Mason University	62
Hamilton, Marci A., professor of law, Benjamin N. Cardozo School of Law	83
Hayworth, Hon. J.D., a Representative in Congress from the State of Arizona	43
Schoenbrod, David, professor, New York Law School, and adjunct scholar, Cato Institute	58
Smith, Hon. Nick, a Representative in Congress from the State of Michigan ...	22
Taylor, Hon. Charles H., a Representative in Congress from the State of North Carolina	48
Taylor, Jerry, director, natural resources studies, the Cato Institute	69
Wetstone, Gregory S., legislative director, Natural Resources Defense Council	65

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Brewster, Hon. Bill K., a Representative in Congress from the State of Oklahoma: Prepared statement	54
Gellhorn, Ernest, a professor of law, George Mason University: Prepared statement	64
Hamilton, Marci A., professor of law, Benjamin N. Cardozo School of Law: Prepared statement	85
Hayworth, Hon. J.D., a Representative in Congress from the State of Arizona: Prepared statement	46
Schoenbrod, David, professor, New York Law School, and adjunct scholar, Cato Institute: Prepared statement	60
Smith, Hon. Nick, a Representative in Congress from the State of Michigan: Prepared statement	41
Taylor, Hon. Charles H., a Representative in Congress from the State of North Carolina:	
Harvard Journal on Legislation	25
Prepared statement	51
Taylor, Jerry, director, natural resources studies, the Cato Institute: Prepared statement	71
Wetstone, Gregory S., legislative director, Natural Resources Defense Council: Prepared statement	67

ROLE OF CONGRESS IN MONITORING ADMINISTRATIVE RULEMAKING

THURSDAY, SEPTEMBER 12, 1996

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL AND
ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2226, Rayburn House Office Building, Hon. George W. Gekas (chairman of the subcommittee) presiding.

Present: Representatives George W. Gekas, Bob Inglis, Steve Chabot, Bob Barr, and Jack Reed.

Also present: Raymond V. Smietanka, chief counsel; Roger T. Fleming, counsel; Diana Schacht, deputy general counsel; Susana Gutierrez, clerk, and Agnieszka Fryszman, minority counsel.

OPENING STATEMENT OF CHAIRMAN GEKAS

Mr. GEKAS. The hour of 10 o'clock having arrived, this hearing of the Commercial and Administrative Law Subcommittee of the House Judiciary Committee will come to order. However, we will recess until the appearance of another member of the subcommittee, so that we have a working quorum.

[Recess.]

Mr. GEKAS. The time of the recess having expired and the attendance of a working quorum having been assured by the arrival of the gentleman from Rhode Island, Mr. Reed. We will proceed with the hearing scheduled for this time.

It is no secret that this Congress, in particular, as well as prior Congresses have been continuously vexed with the problem of agency rulemaking. Today's hearing is going to focus on a topic previously attended to in different ways, but, nevertheless, unique in their own projection of the problem.

This Congress has passed some exciting legislation regarding the rulemaking process but we wouldn't be having this hearing if what we had done was enough. The business community and homeowners across the land are affected or disaffected by the rulemaking process. We're going to hear the rationale for a massive change in agency rulemaking by the Congress from the first panel. Following them, a distinguished panel of people from the private sector will discuss solutions to the problems is caused by agency rulemaking. We look forward to hearing from our colleagues first and look to solutions thereafter.

[The bills, H.R. 47, H.R. 2727, and H.R. 2990, follows:]

104TH CONGRESS
1ST SESSION

H. R. 47

To require approval by law of agency rules and regulations.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 4, 1995

Mr. TAYLOR of North Carolina introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To require approval by law of agency rules and regulations.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Regulatory Relief and
5 Reform Act”.

6 **SEC. 2. AGENCY RULES REQUIRED TO BE APPROVED BY**
7 **LAW.**

8 (a) APPROVAL REQUIREMENT.—Section 553 of title
9 5, United States Code, is amended—

10 (1) in subsection (a), in the matter preceding
11 paragraph (1), by striking “except to the extent”

1 and inserting “except that subsections (b), (e), (d),
2 and (e) do not apply to the extent”; and

3 (2) by adding at the end the following:

4 “(f) A rule or regulation shall not be effective unless
5 it is approved by law.”.

6 (b) APPLICATION.—The amendment made by sub-
7 section (a) shall apply to—

8 (1) a rule or regulation issued in final form
9 after the date of the enactment of this Act; and

10 (2) a rule or regulation issued in final form be-
11 fore the date of the enactment of this Act, if the
12 first effective date of the rule or regulation occurs
13 after the date of the enactment of this Act.

○

104TH CONGRESS
1ST SESSION

H. R. 2727

To require Congress and the President to fulfill their Constitutional duty
to take personal responsibility for Federal laws.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 6, 1995

Mr. HAYWORTH (for himself, Mr. CUNNINGHAM, Mr. DOOLITTLE, Mr. HANSEN, Mr. HEINEMAN, Mr. KINGSTON, Mr. SALMON, Mr. SOLOMON, Mr. SPENCE, Mr. TAUZIN, and Mr. YOUNG of Alaska) introduced the following bill: which was referred to the Committee on the Judiciary, and in addition to the Committee on Rules, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To require Congress and the President to fulfill their Constitutional duty to take personal responsibility for Federal laws.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the "Congressional Respon-
5 sibility Act of 1995".

1 **SEC. 2. PURPOSE.**

2 The purpose of this Act is to promote compliance
3 with Article I of the United States Constitution, which
4 grants legislative powers solely to Congress. Article I en-
5 sures that Federal regulations will not take effect unless
6 passed by a majority of the members of the Senate and
7 House of Representatives and signed by the President, or
8 that the members of the Senate and House of Representa-
9 tives override the President's veto. This Act ends the prac-
10 tice whereby Congress delegates its responsibility for mak-
11 ing regulations to unelected, unaccountable officials of the
12 executive branch and requires that regulations proposed
13 by agencies of the executive branch be affirmatively en-
14 acted by Congress before they become effective. The Act
15 will result in a more democratic and accountable Congress
16 and protect the public from regulations for which elected,
17 accountable officials are unwilling to take responsibility.

18 **SEC. 3. ENACTMENT OF AGENCY REGULATIONS.**

19 (a) CONGRESSIONAL APPROVAL.—A regulation shall
20 not take effect before the date of the enactment of a bill
21 described in section 4(a) comprised solely of the text of
22 the regulation.

23 (b) AGENCY REPORT.—Whenever an agency promul-
24 gates a regulation, the agency shall submit to each House
25 of Congress a report containing the text of the proposed
26 regulation and an explanation of the proposed regulation.

1 The explanation shall consist of the concise general state-
2 ment of their basis and purpose required by section 553
3 of title 5, United States Code and such explanatory docu-
4 ments as are mandated by other statutory requirements.

5 **SEC. 4. EXPEDITED CONGRESSIONAL PROCEDURES FOR**
6 **AGENCY REGULATIONS.**

7 (a) INTRODUCTION.—Not later than three legislative
8 days after the date on which an agency submits a report
9 under section 3(b), the Majority Leader of each House of
10 Congress shall introduce (by request) a bill comprised sole-
11 ly of the text of the regulation contained in the report.
12 If such a bill is not introduced in a House of Congress
13 as provided in the preceding sentence, then any Member
14 of that House may introduce such a bill.

15 (b) BILL.—For purposes of this section, the term
16 “bill” means a bill of the two Houses of Congress, the
17 matter after the enacting clause of which is as follows:
18 “The following agency regulations are hereby approved
19 and shall have the force and effect of law:” (the text of
20 the regulations being set forth after the semicolon).

21 (c) REFERRAL AND CONSIDERATION.—(1) A bill de-
22 scribed in subsection (b) shall not be referred to a commit-
23 tee.

24 (2) It is in order for any Member of the respective
25 House to move to proceed to the consideration of the bill.

1 A Member may make the motion only on the day after
2 the calendar day on which the Member announces to the
3 House concerned the Member's intention to make the mo-
4 tion. All points of order against the bill (and against con-
5 sideration of the bill) are waived. The motion is highly
6 privileged in the House of Representatives and is privi-
7 leged in the Senate and is not debatable. The motion is
8 not subject to amendment, or to a motion to postpone,
9 or to a motion to proceed to the consideration of other
10 business. A motion to reconsider the vote by which the
11 motion is agreed to or disagreed to shall not be in order.
12 If a motion to proceed to the consideration of the bill is
13 agreed to, the respective House shall immediately proceed
14 to consideration of the bill without intervening motion,
15 order, or other business, and the bill shall remain the un-
16 finished business of the respective House until disposed
17 of.

18 (3) Debate on the bill, and on all debatable motions
19 and appeals in connection therewith, shall be limited to
20 not more than one hour, which shall be divided equally
21 between those favoring and those opposing the bill. An
22 amendment to the bill is not in order. A motion further
23 to limit debate is in order and not debatable. A motion
24 to postpone, or a motion to proceed to the consideration
25 of other business, or a motion to recommit the bill is not

1 in order. A motion to reconsider the vote by which the
2 bill is agreed to or disagreed to is not in order.

3 (4) Appeals from the decisions of the Chair relating
4 to the application of the regulations of the Senate or the
5 House of Representatives, as the case may be, to the pro-
6 cedure relating to the bill shall be decided without debate.

7 (d) FINAL PASSAGE.—A vote on final passage of a
8 bill described in subsection (b) shall be taken in a House
9 of Congress on or before the close of the 60th calendar
10 day after the date of the introduction of the bill in that
11 House.

12 (e) EXCEPTION.—A motion to suspend the applica-
13 tion of subsections (e) and (d) is in order in either House
14 of Congress and shall be considered as passed or agreed
15 to by a vote of a majority of the Members voting. Upon
16 the passage of such a motion, the bill shall be considered
17 in the same manner as other bills.

18 (f) TREATMENT IF THE OTHER HOUSE HAS
19 ACTED.—(1) If, before the passage by one House of a bill
20 introduced in that House described in subsection (b), that
21 House receives from the other House a bill described in
22 subsection (b) comprised of the same text, then:

23 (A) The bill of the other House shall not be re-
24 ferred to a committee and may not be considered in

1 the House receiving it except in the case of final
2 passage as provided in subparagraph (B)(ii).

3 (B) With respect to a bill described in sub-
4 section (b) of the House receiving the bill—

5 (i) the procedure in that House shall be
6 the same as if no bill had been received from
7 the other House; but

8 (ii) the vote on final passage shall be on
9 the bill of the other House.

10 (2) Upon disposition of the bill received from the
11 other House, it shall no longer be in order to consider the
12 bill that originated in the receiving House.

13 **SEC. 5. DEFINITIONS.**

14 For purposes of this Act:

15 (1) AGENCY.—The term “agency” has the
16 meaning given the term in section 551(1) of title 5,
17 United States Code.

18 (2) REGULATION.—The term “regulation” has
19 the meaning given the term “rule” in section 551(4)
20 of title 5, United States Code, except that such term
21 does not include—

22 (A) any regulation of particular applicabil-
23 ity; or

1 (B) any interpretative rule, general state-
2 ment of policy, or any regulation of agency or-
3 ganization, personnel, procedure, or practice.

4 **SEC. 6. EFFECTIVE DATE.**

5 This Act shall apply to agency regulations promul-
6 gated after the date of the enactment of this Act.

7 **SEC. 7. JUDICIAL REVIEW.**

8 A regulation contained in a bill enacted pursuant to
9 this Act is not an agency action for the purpose of Judicial
10 review under chapter 7 of title 5, United States Code.



104TH CONGRESS
2D SESSION

H. R. 2990

To require congressional approval of proposed rules considered by the Congress to be significant rules.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 28, 1996

Mr. SMITH of Michigan introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Rules, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To require congressional approval of proposed rules considered by the Congress to be significant rules.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Significant Regulation
5 Oversight Act of 1996”.

6 **SEC. 2. FINDING AND PURPOSE.**

7 (a) FINDING.—The Congress finds that oversight of
8 significant rules will be enhanced if they are subject to

1 congressional review and approval after being proposed by
2 an agency.

3 (b) PURPOSE.—The purpose of this Act is to ensure
4 that before a significant rule takes affect—

5 (1) Congress is given an adequate opportunity
6 to review the rule and ensure that it is in accordance
7 with the intent of Congress in enacting the law
8 under which the rule is proposed; and

9 (2) Congress approves the rule in accordance
10 with the procedures established by this Act.

11 **SEC. 3. REVIEW OF SIGNIFICANT RULES BY CONGRESS.**

12 (a) CONGRESSIONAL APPROVAL OF SIGNIFICANT
13 RULES REQUIRED.—A significant rule shall not take ef-
14 fect before the date of the enactment of a joint resolution
15 described in section 4(a) comprised solely of the text of
16 the significant rule.

17 (b) REPORTING AND REVIEW OF SIGNIFICANT
18 RULES.—(1) Before a proposed significant rule would
19 take effect as a final rule, the agency proposing the rule
20 shall submit to each House of Congress a report contain-
21 ing the following:

22 (A) A copy of the proposed significant rule.

23 (B) A concise summary of the proposed signifi-
24 cant rule, its purpose, and anticipated effects.

(C) A complete copy of any cost-benefit analysis report that has been prepared by the agency with respect to the proposed significant rule.

(D) An explanation of the specific statutory interpretation under which a rule is proposed, including an explanation of—

(i) whether the interpretation is expressly required by the text of the statute; or

(ii) if the interpretation is not expressly required by the text of the statute, an explanation that the interpretation is within the range of permissible interpretations of the statute as identified by the agency, and an explanation why the interpretation selected by the agency is the agency's preferred interpretation.

(E) Any other relevant information or requirements under any other Act and any relevant Executive order.

(2) Upon receipt of a report under paragraph (1), each House of Congress shall provide a copy of the report to the Chairman and ranking minority party member of each committee with jurisdiction over the subject matter of the report.

(c) NO INFERENCE TO BE DRAWN WHERE CONGRESS FAILS TO APPROVE.—If Congress fails to enact

1 a joint resolution approving a proposed significant rule,
2 no court or agency may infer any intent of Congress from
3 any action or inaction of Congress with regard to such
4 rule or related statute.

5 **SEC. 4. CONGRESSIONAL APPROVAL PROCEDURE FOR SIG-**
6 **NIFICANT RULES.**

7 (a) INTRODUCTION.—Not later than 3 legislative
8 days after the date on which an agency submits a report
9 under section 3(b) containing the text of any proposed sig-
10 nificant rule, the majority leader of each House of the
11 Congress shall introduce (by request) a joint resolution
12 comprised solely of the text of that significant rule. If the
13 joint resolution is not introduced in either House as pro-
14 vided in the preceding sentence, then any Member of that
15 House may introduce the joint resolution.

16 (b) REFERRAL AND CONSIDERATION.—(1) The joint
17 resolution shall be referred to the appropriate committee
18 of the House in which it is introduced. The committee may
19 report the joint resolution without substantive revision and
20 with or without recommendation or with an adverse rec-
21 ommendation, or the committee may vote not to report
22 the joint resolution. If the committee votes to order the
23 joint resolution reported, it shall be reported not later than
24 the end of the period (not to exceed 45 legislative days)
25 established for consideration of the joint resolution by the

1 Speaker of the House of Representatives or the majority
2 leader of the Senate, as the case may be. Except in the
3 case of a joint resolution which a committee votes not to
4 report, a committee failing to report a joint resolution
5 within such period shall be automatically discharged from
6 consideration of the joint resolution, and it shall be placed
7 on the appropriate calendar.

8 (2) A vote on final passage of the joint resolution
9 shall be taken in that House on or before the close of the
10 90th legislative day after the date of the introduction of
11 the joint resolution in that House.

12 (3)(A) A motion in the House of Representatives to
13 proceed to the consideration of a joint resolution under
14 this section shall be highly privileged and not debatable.
15 An amendment to the motion shall not be in order, nor
16 shall it be in order to move to reconsider the vote by which
17 the motion is agreed to or disagreed to.

18 (B) Debate in the House of Representatives on a
19 joint resolution under this section shall be limited to not
20 more than 4 hours, which shall be divided equally between
21 those favoring and those opposing the joint resolution. A
22 motion further to limit debate shall not be debatable. It
23 shall not be in order to move to recommit a joint resolution
24 under this section or to move to reconsider the vote by
25 which the joint resolution is agreed to or disagreed to.

1 (C) All appeals from the decisions of the chair relat-
2 ing to the application of the Rules of the House of Rep-
3 resentatives to the procedure relating to a joint resolution
4 under this section shall be decided without debate.

5 (D) Except to the extent specifically provided in the
6 preceding provisions of this subsection, consideration of a
7 joint resolution under this section shall be governed by the
8 Rules of the House of Representatives applicable to other
9 joint resolutions in similar circumstances.

10 (4)(A) A motion in the Senate to proceed to the con-
11 sideration of a joint resolution under this section shall be
12 privileged and not debatable. An amendment to the motion
13 shall not be in order, nor shall it be in order to move to
14 reconsider the vote by which the motion is agreed to or
15 disagreed to.

16 (B) Debate in the Senate on a joint resolution under
17 this section, and all debatable motions and appeals in con-
18 nection therewith, shall be limited to not more than 10
19 hours. The time shall be equally divided between, and con-
20 trolled by, the majority leader and the minority leader or
21 their designees

22 (C) Debate in the Senate on any debatable motion
23 or appeal in connection with a joint resolution under this
24 section shall be limited to not more than 1 hour, to be
25 equally divided between, and controlled by, the mover and

1 the manager of the joint resolution, except that in the
2 event the manager of the joint resolution is in favor of
3 any such motion or appeal, the time in opposition thereto,
4 shall be controlled by the minority leader or his designee.
5 Such leaders, or either of them, may, from time under
6 their control on the passage of a joint resolution, allot ad-
7 ditional time to any Senator during the consideration of
8 any debatable motion or appeal.

9 (D) A motion in the Senate to further limit debate
10 on a joint resolution under this section is not debatable.
11 A motion to recommit a joint resolution under this section
12 is not in order.

13 (c) AMENDMENTS PROHIBITED.—No amendment to
14 a joint resolution considered under this section shall be
15 in order in either the House of Representatives or the Sen-
16 ate. No motion to suspend the application of this sub-
17 section shall be in order in either House, nor shall it be
18 in order in either House for the presiding officer to enter-
19 tain a request to suspend the application of this subsection
20 by unanimous consent.

21 (d) TREATMENT IF THE OTHER HOUSE HAS
22 ACTED.—If, before the passage by one House of a joint
23 resolution of that House described in subsection (a), that
24 House receives from the other House a joint resolution

1 described in subsection (a) comprised of the same text,
2 then:

3 (1) The procedure in that House shall be the
4 same as if no joint resolution had been received from
5 the other House.

6 (2) The vote on final passage shall be on the
7 joint resolution of the other House.

8 (e) CONSTITUTIONAL AUTHORITY.—This section is
9 enacted by Congress—

10 (1) as an exercise of the rulemaking power of
11 the Senate and the House of Representatives, re-
12 spectively, and as such it is deemed a part of the
13 rules of each House, respectively, but applicable only
14 with respect to the procedure to be followed in that
15 House in the case of a joint resolution described in
16 subsection (a), and it supersedes other rules only to
17 the extent that it is inconsistent with such rules; and

18 (2) with full recognition of the constitutional
19 right of either House to change the rules (so far as
20 relating to the procedure of that House) at any time,
21 in the same manner, and to the same extent as in
22 the case of any other rule of that House.

1 **SEC. 5. EXISTING RULES.**

2 (a) GENERAL.—Any existing rule may be revised or
3 revoked in accordance with this section if a petition for
4 review so requests.

5 (b) INTRODUCTION.—If a petition for review is filed
6 with the Clerk of the House of Representatives or the Sec-
7 retary of the Senate, the Clerk or the Secretary shall de-
8 termine whether the petition meets the requirements of
9 subsection (d). If the Clerk or the Secretary determines
10 that a petition meets those requirements, he or she shall
11 notify the majority leader of that House. The majority
12 leader so notified shall, within 3 legislative days, introduce
13 a joint resolution (by request) that makes the revision or
14 revocation of existing rules proposed by the petition upon
15 the enactment of that joint resolution. If the joint resolu-
16 tion is not introduced as provided in the preceding sen-
17 tence, then any Member of that House may introduce the
18 joint resolution.

19 (c) PROCEDURES FOR CONSIDERATION IN THE
20 HOUSE OF REPRESENTATIVES AND THE SENATE.—Any
21 joint resolution introduced under subsection (b) shall be
22 considered in the House of Representatives and the Senate
23 in accordance with the procedures respecting a joint reso-
24 lution set forth in section 4.

25 (d) PETITIONS FOR REVIEW.—A petition for review
26 under subsection (a) shall contain the following:

1 (1) Any rule affected by the petition and the
2 contents of that rule as it would exist if a joint reso-
3 lution revising or revoking that rule pursuant to the
4 petition were enacted.

5 (2) For a petition in the Senate, the signatures
6 of 30 Senators, or for a petition in the House of
7 Representatives, the signatures of 120 Members.

8 **SEC. 6. DEFINITIONS.**

9 For purposes of this Act:

10 (1) **AGENCY.**—The term “agency” has the
11 meaning given that term in section 551 of title 5,
12 United States Code (relating to administrative pro-
13 cedure).

14 (2) **RULE.**—(A) The term “rule” has the mean-
15 ing given such term by section 551 of title 5, United
16 States Code, except that such term does not in-
17 clude—

18 (i) any rule of particular applicability in-
19 cluding a rule that approves or prescribes—

20 (I) future rates, wages, prices, serv-
21 ices, or allowances therefor,

22 (II) corporate or financial structures,
23 reorganizations, mergers, or acquisitions
24 thereof, or

1 (III) accounting practices or dislo-
2 sures bearing on any of the foregoing, or
3 (ii) any rule of agency organization, per-
4 sonnel, procedure, practice, or any routine mat-
5 ter.

6 (B) The term “final rule” means any final rule
7 or interim final rule.

8 (3) SIGNIFICANT RULE.—The term “significant
9 rule” means any rule proposed by an agency that is
10 specified or described as such in the Act that au-
11 thorizes the rule.

12 **SEC. 7. EXEMPTION FOR MONETARY POLICY.**

13 Nothing in this Act applies to any rule concerning
14 monetary policy proposed or implemented by the Board
15 of Governors of the Federal Reserve System or the Fed-
16 eral Open Market Committee.

○

Mr. GEKAS. We recognize the gentleman from Rhode Island, Mr. Reed, for any opening statement that he might have.

Mr. REED. Thank you, Mr. Chairman. I would, without objection, like to submit a written statement and get quickly to the witnesses.

Mr. GEKAS. Without objection.

Mr. REED. I appreciate the fact that our colleagues are here today to talk about the proposals they've made, and I believe this hearing provides a good opportunity for our colleagues to make the case that specific and additional action is necessary to reform the regulatory process. As you've mentioned, Mr. Chairman, we have this year passed measures which are designed to streamline and make more effective the regulatory process. In particular, Public Law 104-121 provides a 60-day congressional review period for significant rules during which time Congress can reject a proposed rule. That law will be implemented in the next Congress. But there's always, I think, the requirement and the obligation to continue to look for ways to make the regulatory process more effective and more responsive to the people of the United States. And so I'm eager to hear our colleagues and the panel that follows them. Unfortunately, I have a scheduling conflict, Mr. Chairman, so I may be leaving early, and I would also ask unanimous consent that I and any other members who may be absent be permitted to submit questions for the record.

Mr. GEKAS. Without objection, it is so ordered.

Mr. REED. Thank you, Mr. Chairman. I yield back my time.

Mr. GEKAS. With that, we will recognize our panel of colleagues by calling them in the order in which they are printed in our agenda: the Honorable Nick Smith of Michigan, J.D. Hayworth of Arizona, Charles Taylor of North Carolina, Bill Brewster of Oklahoma, and Gary Condit of California.

We'll begin with Mr. Smith.

STATEMENT OF HON. NICK SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. SMITH of Michigan. Mr. Chairman, Mr. Ranking Minority Member, thank you very much.

Just briefly, my experience has been on both sides of the issue of developing regulations and passing laws that resulted in the promulgation of rules in the Michigan Legislature and in Congress. In Michigan, I served on our Michigan OSHA Commission. There were nine commissioners. We had the general mandate in legislation that we would pass safety regulations as strong as possible—and make an effort to make the workplace safe.

From that general, very small law which encompassed about six pages, we have developed almost a thousand pages of rules and regulations in OSHA, and the commission expanded tremendously the laws and regulations, even going into detail about what sectors the employer would furnish clothing and steel shoes and gloves, et cetera, and established that it was their responsibility to furnish it for the employees. This demonstrates a tremendous expansion in the rulemaking process of those laws.

In the Michigan Legislature we had what is called JCAR, Joint Committee on Administrative Rules where every law would come

back to the Joint Committee on Administrative Rules to decide whether that rule was consistent with the intent of the law. So in Michigan we've had this oversight. Of course, nationally, we had it up until 1983, and then we have lost it. The question is, if we have the responsibility to pass these laws, should there be some effort to try to assure that the promulgation of rules reflects the intent of the law in the first place?

Let me tell you just briefly about—

Mr. GEKAS. Excuse me, is that review commission still in existence in Michigan?

Mr. SMITH of Michigan. Yes, JCAR is still in existence.

Mr. GEKAS. Pennsylvania has the same.

Mr. SMITH of Michigan. We have given away a lot of our authority. I was a political supergrade during the Nixon administration in the U.S. Department of Agriculture. At that time we had a Democrat Congress, and as they passed laws, we would promulgate rules that more reflected our personal philosophy, regardless of the language in the law, because there was no real oversight. The only latitude that Congress had was to go through a very complicated procedure of rewriting the law almost to change the rules that we promulgated.

My bill, which is 2990, simply says that if an authorizing committee wants to review the rules, they would so designate when the law is passed, and if they designate that they want that ability to review the rules that implement that particular law, the rule would come back to that authorizing committee and they would review to see if they were happy with it. We'd put it on a fast track, and that committee would have 45 legislative days to accept or reject that particular bill. If they rejected it, there was still the option of a discharge coming from the floor to decide whether or not, by reference, those rules would be enacted into law.

So we have overcome the Supreme Court's objection to the legislative branch usurping the authority of the administration with the bills that all three of us have introduced. It seems to me that Congress is more responsible to the people, that bureaucrats sometimes are less responsible to the individuals, and so this kind of oversight is not partisan; it's not Republican or Democrat. It's a question of whether Congress should do more in looking at the rules that are promulgated.

In Michigan we had about 14 pages of rules for every 1 page of legislation. Federally, with 133,000 pages of regulations compared to 33,000 pages of law, there is almost a 4-to-1 expansion of the law in precisely defining how that law is going to be implemented.

Thank you for this opportunity. The Harvard Journal on Legislation printed my essay in their last, most recent journal. I hope that might—

Mr. GEKAS. That hurts your case.

Mr. SMITH of Michigan. Pardon?

Mr. GEKAS. That hurts you. [Laughter.]

Mr. SMITH of Michigan. Well, this is—I'm sure, Mr. Chairman, this was one of the conservative law journals of Harvard.

Mr. REED. I didn't know they had any. [Laughter.]

Mr. SMITH of Michigan. I would ask that that be considered as part of the record, as well as my written testimony.

Mr. GEKAS. Without objection, it will become a part of the record, and we thank you.
[The information follows:]

HARVARD JOURNAL

on

LEGISLATION

CONGRESS ISSUE

POLICY ESSAY

RESTORATION OF CONGRESSIONAL AUTHORITY AND RESPONSIBILITY
OVER THE REGULATORY PROCESS *Congressman Nick Smith*

ARTICLES

BACK TO THE FUTURE: THE COLLAPSE OF NATIONAL DRUG CONTROL
POLICY AND A BLUEPRINT FOR REVITALIZING THE NATION'S
COUNTERNARCOTICS EFFORT *Robert B. Charles*
"BUDGETIZED" HEALTH ENTITLEMENTS AND THE FISCAL
CONSTITUTION IN CONGRESS'S 1995-1996 BUDGET BATTLE
..... *Charles Tiefer*
PROTECTING SOCIAL SECURITY AND MEDICARE
..... *William G. Dauster*

ESSAYS

THE FADE OF PUBLIC DEBATE IN THE UNITED STATES
..... *Philip Heymann & Jody Heymann*
THE POLITICS OF CRIME *Harry A. Chernoff,*
Christopher M. Kelly, & John R. Kroger
..... *with a Response by Senator Herb Kohl*
HEALTH CARE REFORM IN THE 103D CONGRESS—A CONGRESSIONAL
ANALYSIS *Manish C. Shah & Judith M. Rosenberg*

BOOK REVIEWS

Volume 33, Number 2

Summer 1996

Copyright © 1996 by the
PRESIDENT AND FELLOWS OF HARVARD COLLEGE

ISSN 0017-808X

POLICY ESSAY

RESTORATION OF CONGRESSIONAL AUTHORITY AND RESPONSIBILITY OVER THE REGULATORY PROCESS

CONGRESSMAN NICK SMITH*

We get to vote for senators, congressmen, and presidents. But we have less and less control over our lives because we have no control over the people who make the rules by which we live—about how we make and sell our products, which groups get what preferences, how we can use our land.¹

The majority in the 104th Congress believes that Congress must do more to monitor administrative rulemaking.² An enormous amount of lawmaking responsibility rests with agency staffers who write the regulations to implement statutes. These government employees are seldom personally affected by these rules or truly accountable to those affected. Consequently, they often produce onerous regulations that serve the agency's goals and philosophy—which are often influenced by a smaller constituency of activists—rather than the overall public good.³ The peo-

* Member, United States House of Representatives (R-Mich.). B.A., Michigan State University, 1957; M.S., University of Delaware, 1959. Representative Smith served in the United States Department of Agriculture, as a Commissioner of the Michigan Occupational Safety and Health Administration, and on the Michigan Joint Committee on Administrative Rules. The author would like to thank Alec D. Rogers, Esq., who assisted in the preparation of this Policy Essay.

¹ Malcolm Wallop, Taking on Big Government: Agenda for the 1990's, Address at Hillsdale College's Shavano Institute for National Leadership Seminar (Feb. 21, 1995), in *IMPRIMIS*, July 1995, at 2.

² ROGELIO GARCIA, CONG. RES. SERV., ISSUE BRIEF IB95035, FEDERAL REGULATORY REFORM Summary (1996) ("[Republicans] introduced bills designed to reduce what they saw as overly costly and onerous regulations."). The Republican majority of the House was elected upon a platform entitled *Contract with America* [hereinafter the *Contract*]. Signed by 367 of the 421 Republican House candidates, the *Contract* contained 10 legislative initiatives upon which Republicans guaranteed the full House would vote during the first hundred days of the 104th Congress. See NEWT GINGRICH ET AL., *CONTRACT WITH AMERICA* 6-12 (Ed Gillespie & Bob Schellhas eds., 1994). Parts of the *Contract* tackle some of the problems with our regulatory system that this Policy Essay discusses. For instance, the House has passed the Job Creation and Wage Enhancement Act, which embodies one of the elements of the *Contract*. Compare H.R. 9, 104th Cong., 1st Sess. (1995) (as passed by the House) with GINGRICH ET AL., *supra*, at 125-41.

³ DAVID SCHOLNBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 111-12 (1993). For instance, federal agricultural marketing orders for oranges persisted from 1933 through 1992 while increasing the price of oranges, preventing the sale of about one third of the harvest, but failing to

ple who supervise the writing of the rules are often of a different political party than the majority in Congress and may disagree with the policies underlying a statute. Regulatory lawmaking has also eroded the American people's confidence in the federal government.⁴ By increasingly abdicating the ultimate lawmaking function to agencies, Congress has left the American people with less and less control over their lives.⁵

This Policy Essay presents an initiative to alter the overall regulatory process, as opposed to more narrow proposals that would affect only certain agencies.⁶ It discusses why regulatory reform is vital, analyzes a few types of reform that are currently under consideration, and concludes with an explication of my proposal to require that Congress affirmatively enact significant rules.⁷

I. THE PROBLEM: DELEGATION OF CONGRESSIONAL AUTHORITY TO THE EXECUTIVE BRANCH LEADS TO ILLEGITIMATE AND EXCESSIVE REGULATION

A. *The Political Illegitimacy of the Current Regulatory Process*

A couple of recent developments have made regulatory reform a pressing issue. First, recent years have witnessed the promulgation of a significant number of new regulations.⁸ Second, the

increase the long-term profits of the orange growers. *See id.* at 4-5. One writer summarizes the process succinctly:

The pattern is familiar: a statute is passed, an agency is created, a regulation is promulgated. At the same time, a narrow constituency is created that benefits from the statute, works for the agency, or receives favorable treatment under the regulation. The remainder of the citizenry does not have enough time, energy, or interest to focus on this small corner of the political landscape.

Vern McKinley, *Sunrises Without Sunsets: Can Sunset Laws Reduce Regulation?*, REG., Fall 1995, at 57, 57.

⁴ SCHOENBROD, *supra* note 3, at 195-96.

⁵ *See* PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA 182-83 (1994). *See also* Nancie G. Marzulla, *State Private Property Rights Initiatives as a Response to "Environmental Takings"*, in ROGER CLEGG ET AL., REGULATORY TAKINGS 87 (1994) (citing economist Paul Craig Roberts's estimate that the growth in law since the turn of the century has been 3000%).

⁶ *See, e.g.*, H.R. 1834, 104th Cong., 1st Sess. § 22 (1995) (as introduced in the House) (requiring the Occupational Safety and Health Administration (OSHA) to incorporate cost-benefit analysis into its rulemaking).

⁷ H.R. 2990, 104th Cong., 2d Sess. (1996) (as introduced in the House).

⁸ As an indication of this trend, the approximate number of pages in the Code of Federal Regulations has grown from 55,000 to 134,000 between 1970 and 1995 while

aggregate cost of regulation has ballooned; businesses and other economic actors spend billions of dollars on compliance and fines, sometimes with no corresponding social benefit.⁹ As more people recognize these problems, a consensus is building that we must address a significant underlying cause: Congress has given away too much of its constitutional power over both law-making and appropriations.¹⁰

Regulations are laws.¹¹ They govern the lives of people exactly as do the statutes enacted by Congress or state legislatures. In some cases, they do so even more directly because they control the implementation of general statutory commands. Many regulations are enforced under statutes that provide severe civil and even criminal penalties.¹² Yet, members of Congress rarely vote for these rules.

Unlike ordinary federal laws (i.e., statutes), which must pass both the House and the Senate and be presented to the President,¹³ such regulations require no legislative branch participation beyond the enactment of an enabling statute. The civil servants and political appointees in an agency draft the rules they

the approximate number in the United States Code has increased from 13,000 to 33,000 over the same period. See *infra* text accompanying notes 41–43.

⁹ See *infra* text accompanying notes 43–45.

¹⁰ A shockingly small amount of federal spending is truly discretionary. The Congressional Budget Office ("CBO") defines discretionary spending as "[s]pending for programs whose funding levels are determined through the appropriation process." CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: FISCAL YEARS 1996–2000, at 110 (Jan. 1995) [hereinafter FISCAL YEARS 1996–2000]. In 1962 discretionary spending was 70% of the federal budget. *Id.* at 96. By 1995 it had declined to 36%. CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK 22 (Aug. 1995). The CBO has projected that by the year 2005 it will be at 28%. CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: DECEMBER 1995 UPDATE 22 (Dec. 1995).

¹¹ Regarding rulemaking, Abner Greene has written:

We have euphemisms—we call this power "regulatory" or "interpretive" or "gap filling." But . . . the delegation from Congress is often vague or silent on a key issue, and the resulting rule—from either rulemaking or adjudication—is a public policy choice in much the same way that statutes are policy choices.

Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 123 (1994) (footnote omitted), citing *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984).

¹² See, e.g., the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6928(d)(2)(C) (1994) (providing criminal penalties consisting of fines of up to \$100,000 and up to 10 years of imprisonment for violating interim status regulations); the Clean Air Act 42 U.S.C. § 7413(c)(1) (1994) (10 years of imprisonment for violation of certain rules); and the Clean Water Act, 33 U.S.C. § 1319(c) (1994) (fines of up to \$100,000 per day and imprisonment for negligent violation of the conditions of permits issued under the Federal Water Pollution Control Act).

¹³ U.S. CONST., art. I, § 7, cls. 2–3.

think are necessary to implement the statute *as they have interpreted it*¹⁴—often after informal consultations with a variety of interested private parties, academics, and other officials in government.¹⁵

The agency must coordinate this drafting process with the White House Office of Management and Budget (OMB) and must receive clearance from other bureaucrats in OMB before publishing the draft rule in a Notice of Proposed Rulemaking in the *Federal Register*.¹⁶ After a comment period, the civil servants and political appointees in the agency will decide whether or not to issue a final regulation. Before promulgating a regulation, the agency must once again receive OMB clearance.¹⁷ Upon promulgation, we have a new law—a law that may not even be consistent with the intent of Congress in passing the organic statute.

Congress presently exerts control over agency lawmaking in a few different ways. Most directly, it enacts legislation rescinding or modifying promulgated regulations. In practice, this approach necessarily cedes much authority to the agency; the regulation is law unless new legislation overrides it. The current process is biased in favor of regulation, since the burden is on Congress to alter the status quo. Since the President's appointees have endorsed the regulation,¹⁸ presumably the President does as well. Therefore, to enact a legislative override would almost certainly require two-thirds majorities in both houses.¹⁹ Also, practically speaking, only regulations that are so flawed that they attract substantial attention or that offend senior members of Congress are likely to command the floor time and general legislative effort needed to enact a statute. The convoluted legislative process can result in even uncontroversially good bills getting lost.

Congress can also oversee regulation through the annual appropriations process. First, Congress can explicitly deny funding

¹⁴ See *Chevron*, 467 U.S. at 845.

¹⁵ PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW 307–08 (9th ed. 1995).

¹⁶ Exec. Order No. 12,866, 3 C.F.R. 638, 644–49 (1993), reprinted in 5 U.S.C. § 601 (1994). Among other considerations, OMB is to “provide meaningful guidance and oversight so that each agency’s regulatory actions are consistent with . . . the President’s priorities. . . .” 3 C.F.R. at 646. Independent agencies are not subject to Executive Order No. 12,866. *Id.* at 641.

¹⁷ See *id.* at 644–49. The prior discussion pertains to the more common process of informal rulemaking under § 553 of the Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (1994).

¹⁸ See *supra* notes 14–17 and accompanying text.

¹⁹ See *supra* note 13.

for certain practices. For instance, the House attempted to prohibit OSHA from spending any funds to promulgate ergonomic regulations through the 1996 appropriations bill for the Departments of Labor, Health and Human Services, and Education.²⁰ In this bill the House also tried to transfer OSHA funds from enforcement to compliance assistance.²¹ Second, Congress can influence agency regulatory programs by including instructions in the committee and conference reports accompanying appropriations bills. These instructions put bureaucrats on notice to comply or face possible future retaliation (e.g., funding cuts or explicit denials of funds for certain purposes).

Nevertheless, the appropriations process does not provide Congress with adequate control over agency lawmaking. Congress often faces the objection of the President and, therefore, may need two-thirds majorities in both Houses.²² Also, the appropriations process annually surveys almost the entire federal government, so Congress can attempt to address only the most egregious regulatory practices (or those that particularly offend key members of Congress). Moreover, the process itself restricts legislative changes.²³

The flaws of this system are perhaps not immediately apparent. In practice, however, the regulatory process has proven patently inconsistent with the notion of republican government as understood by the Framers. The unchecked delegation of rule-making authority threatens civil liberties. Moreover, a system with greater congressional involvement would create better rules than does the current process.²⁴

Delegation subverts the basic logic of representation in our system of government. Ostensibly, "the people" are sovereign and, through elections, confer legitimacy upon lawmaking by Congress and the President.²⁵ However, it defies logic to argue

²⁰H.R. 2127, 104th Cong., 1st Sess., tit. I (1995) (as passed by the House); H.R. REP. NO. 209, 104th Cong., 1st Sess. 27 (1995) (committee report accompanying H.R. 2127).

²¹See H.R. 2127, 104th Cong., 1st Sess., tit. I (1995) (as passed by the House); H.R. REP. NO. 209, *supra* note 20, at 27.

²²See *supra* notes 14–17 and accompanying text. However, Presidents are typically reluctant to veto an appropriations bill over relatively minor issues; so, Congress has more clout here than in passing stand-alone bills.

²³See House Rule 21(b) (prohibiting legislation—or non-fiscal provisions—in appropriations bills); of course, the House regularly waives this rule in considering appropriations measures. The Byrd Rule, 2 U.S.C. § 644 (1994), similarly restricts the budget reconciliation process in the Senate.

²⁴See *infra* part II, which addresses this third point.

²⁵See THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961)

that such legitimacy extends to bureaucrats' making of public policy without meaningful guidance and review by Congress.²⁶ To enhance the legitimacy of our laws and to allow citizens greater influence over lawmaking, Congress should retain as much lawmaking power as possible.²⁷

Agency rulemaking also undermines the constitutional separation of powers,²⁸ one of the principal devices upon which the Framers relied to preserve liberty.²⁹ Although the Framers recognized that these powers need not be *rigidly* separated,³⁰ they clearly intended Congress—not the Executive Branch—to legislate. The stark experiences of other nations where this separation has failed highlights the risks of unbalanced government.³¹

The administrative state in the United States clearly does not tyrannize citizens the way that, for example, the former Soviet Union did. Nevertheless, because of the Executive Branch's legislative and judicial activities, the present system concentrates too much power in any agency that (1) promulgates extensive and highly substantive regulations, (2) enforces those regulations, and (3) sometimes adjudicates these enforcement proceed-

("[W]e may define a republic . . . [as] a government which derives all its powers directly or indirectly from the great body of the people. . . . It is *essential* to such a government that it be derived from the great body of the society."); Letter from John Adams to John Taylor (Apr. 15, 1814), in 6 *THE WORKS OF JOHN ADAMS* 447, 474 (Charles C. Little & James Brown eds., 1851) ("There is but one element of government, and that is *The People*.")

²⁶ Of course, senior presidential appointees make the decisions that are controversial within an agency, and OMB clearance ensures consistency (whatever this term means) with the President's program. However, these practices still effectively allow apolitical civil servants to make a wide variety of "legislative" choices.

²⁷ See SCHOENBROD, *supra* note 3, at 112 (writing that agencies are even more likely than Congress to favor narrow, organized interest groups over diffusely affected, broader, unorganized ones).

²⁸ Though such delegations are constitutionally permissible, the extent of delegation that has occurred is undesirable. The Supreme Court has only struck down three statutes on delegation grounds and none since 1936. See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

²⁹ See *THE FEDERALIST*, *supra* note 25, Nos. 47–51 (James Madison). In particular, see *id.* No. 47, at 301 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.").

³⁰ *Id.* No. 48, at 308 ("Unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation . . . essential to a free government, can never in practice be duly maintained.").

³¹ The former Soviet Union provided its people with a lengthy list of rights, see KONST. SSSR [Constitution], arts. 40 (right to employment), 42 (right to health care), 44 (right to housing), 50 (freedoms of speech, press, assembly, and association) (1977), translated in W.E. BUTLER, *BASIC DOCUMENTS ON THE SOVIET LEGAL SYSTEM* 3–33 (1983), but concentrated political power in a handful of people; as a result, these constitutional protections were hollow.

ings.³² The majority in Congress agrees that our current regulatory system is off-track. However, the Supreme Court has constrained Congress's prior efforts to rein in the agencies' powers.

B. *The Loss of the Legislative Veto*

At one time, Congress monitored the Executive Branch and independent agencies via the legislative veto. Congress would enact an enabling statute, and the relevant agency would promulgate regulations in accordance with this statute. However, some enabling statutes included a legislative veto, which provided that rules were subject to reversal if one or both Houses (or, in some cases, just a committee) passed a resolution repealing the Executive Branch's action. This procedure was increasingly used from the early 1970s through 1983.³³

In 1983, the Supreme Court struck down the legislative veto in *INS v. Chadha*.³⁴ The Court reasoned that when Congress acted "legislatively,"³⁵ it had to conform to the dictates of the bicameral requirement and Presentment Clause.³⁶ Because the legislative veto was a "legislative" act that did not adhere to these provisions,³⁷ it violated the constitutional design for the separation of powers.³⁸

The legislative veto was an efficient way for Congress to control the agencies, so the loss of this tool has hampered legislative supervision of the Executive Branch's rulemaking. Given

³² Agency adjudications are subject to judicial review, which arguably preserves an adequate check against agency power. Administrative Procedure Act, 5 U.S.C. § 702 (1994). Moreover, the Administrative Procedure Act, 5 U.S.C. § 554(d)(C), prohibits an agency adjudicator—other than the agency heads—from hearing a case with which the adjudicator has had prior involvement if she (1) has "been involved with ex parte information," or (2) has developed a "will to win." *Grolier, Inc. v. FTC*, 615 F.2d 1215, 1220 (9th Cir. 1980).

³³ ROGELIO GARCIA, CONG. RES. SERV., ISSUE BRIEF IB95035, FEDERAL REGULATORY REFORM: AN OVERVIEW 6 (1996). For a list of statutes employing the legislative veto as of 1983, see *INS v. Chadha*, 462 U.S. 919, 1003-13 (1983) (White, J., dissenting).

³⁴ 462 U.S. 919.

³⁵ *Id.* at 952 (defining legislative action as "alter[ing] the legal duties, rights and relations of persons . . . outside the legislative branch.")

³⁶ *Id.* at 957. For the constitutional provisions, see *supra* note 13 and accompanying text.

³⁷ The INS had granted Chadha a suspension of deportation subject to a veto by either House under § 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254 (1982). The Court held that the House of Representatives veto "altered Chadha's status." 462 U.S. at 952.

³⁸ 462 U.S. at 946.

demands on congressional time, other oversight methods such as the budget process and enacting new statutes to repeal bad rules are too involved to alter any but a small number of flagrantly objectionable regulations.³⁹ Further, civil service laws protect bureaucrats who produce rules that are excessive or in violation of the intent of the statute from being punished through job termination.⁴⁰

C. *The Problem of Regulatory Excess*

Since 1990 the number of final major regulations has dramatically increased.⁴¹ From 1987 to 1990, agencies promulgated 160 final major regulations; from 1991 to 1994 there were 241, an increase of roughly fifty percent.⁴²

Unfortunately, regulations do not come cheap. For instance, the yearly cost to the nation's economy to comply with Occupational Safety and Health Administration (OSHA) rules alone has been estimated at \$8.5 billion in 1988 dollars.⁴³ A small price to pay for the safety of millions of American workers? Of course. The only problem is that some studies have concluded that these regulations have produced *no tangible benefits either in worker safety or health*.⁴⁴ Moreover, the compliance costs of regulations

³⁹ See *supra* text accompanying notes 14–17, 22–23.

⁴⁰ See, e.g., 5 U.S.C. § 4303 (Supp. II 1995) (reductions in grade or removal based on unacceptable performance); *Id.* § 7501 (adverse actions—suspensions for 14 days or less); *Id.* § 7511 (adverse actions—removal, suspension for more than 14 days, reduction in grade or pay, furlough for 30 days or less); *Id.* § 7541 (actions against members of the Senior Executive Service); *Id.* § 7701 (appellate process).

⁴¹ A major rule, as defined by Exec. Order No. 12,291, 3 C.F.R. 127–28 (1981), reprinted in 5 U.S.C.S. § 601 (1989), revoked by Exec. Order No. 12,866, 3 C.F.R. at 649 (1993), is one likely to result in

(1) [a]n annual effect on the economy of \$100 million or more; (2) [a] major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) [s]ignificant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

3 C.F.R. at 127–28 (1981). This definition was replaced by Executive Order No. 12,866, 3 C.F.R. at 641–42. Executive Order 12,866 also includes in its definition of “significant regulatory actions” those that considerably affect the environment, public health, or safety; produce serious inconsistencies with other agencies’ regulations; or raise novel legal or policy issues. *Id.*

⁴² OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, REGULATORY PROGRAM OF THE U.S. GOVERNMENT, APRIL 1, 1992–MARCH 30, 1994 608 (1993) [hereinafter OMB].

⁴³ Robert W. Hahn & John A. Hird, *The Costs and Benefits of Regulation*, 8 YALE J. ON REG. 233, 275–76 (1991).

⁴⁴ *Id.* (noting “the absence of credible studies showing positive benefits of OSHA regulations”).

sometimes exceed the amounts otherwise spent on the regulated subject. For instance, the Defense Department spent \$2 billion on travel in 1994. Yet it spent \$2.2 billion complying with travel reimbursement procedures.⁴⁵

Furthermore, regulations have impeded progress. In the wake of the last Los Angeles earthquake, it was necessary to rebuild the Santa Monica freeway. In order to do so in the shortest possible amount of time, California Governor Pete Wilson decided not to enforce applicable regulations and utilized incentives for prompt work. The result was that "[i]nstead of a four-year trudge through government process, the Santa Monica freeway was rebuilt in sixty-six days, to a higher standard than the old one."⁴⁶ The only problem with the work done on the new highway, as one construction worker observed, was that "they're going to want them all completed this fast."⁴⁷

Regulations also have a ripple effect on government agencies, complicating subsequent regulatory efforts. For example, an agency drafting a new rule may be subject to regulations (such as a requirement to file an environmental impact statement) written by one or more different agencies. The new regulations consequently become more complicated and less comprehensible to the people who must enforce, comply with, and adjudicate them.

An anecdote from early in my government career suggests the magnitude of this problem. From 1970 to 1975, I was a deputy administrator for farm programs in the U.S. Department of Agriculture. My first assignment from Secretary Earl Butz was to reduce the voluminous regulations that had been piling up for the last twenty years. It took two years to reduce the mountain of often conflicting regulations by fifty percent. This experience also showed me how agencies are not always faithful to congressional intent when they write regulations; in fact, I learned first-hand how easy it was to tailor Democrat-passed agricultural legislation to be consistent with a Republican philosophy through the development and administration of rules.

In sum, the regulatory state has had an enormous impact on the United States economy. In testimony before the Senate Com-

⁴⁵HOWARD, *supra* note 5, at 175.

⁴⁶*Id.* at 172. See also Barry Wise, *Rising from the Rubble: Los Angeles Repairs Its Roads*, AM. CITY & COUNTY, Dec. 1994, at 36 (describing Governor Wilson's relaxation of government contracting procedures).

⁴⁷HOWARD, *supra* note 5, at 172.

mittee on Governmental Affairs. Professor Robert Hahn estimated that in 1995 alone the direct costs of all regulations on the economy totalled approximately \$400 billion (in 1992 dollars).⁴⁸ This sum works out to \$3500 per family—about the same amount as the average family spends on groceries annually.⁴⁹ The direct costs of regulation are up sharply from 1986 when they were approximately \$300 billion (in 1992 dollars), the level at which they had been for the previous decade.⁵⁰

While, of course, not all regulations are harmful, an OMB report suggests that the most cost-effective regulations have already been promulgated and that the marginal benefits of more recent regulations may not justify the costs of compliance. The analysis concluded that twelve of the more effective safety and health regulations (those that extended a life for less than \$1 million) were issued prior to 1986, and only five were issued thereafter.⁵¹ Conversely, of those safety and health regulations that cost greater than \$25 million per life extended, six were adopted prior to 1986 and twelve thereafter.⁵²

II. PROPOSALS FOR REFORM AND A STRUCTURAL ALTERNATIVE

The 104th Congress has sought to curb regulatory excess through a variety of suggested reforms. These concepts include barring unfunded mandates,⁵³ requiring cost-benefit⁵⁴ or risk analy-

⁴⁸ *Regulatory Reform: Hearings Before the Senate Comm. on Governmental Affairs*, 104th Cong., 1st Sess. (1995) (statement of Robert W. Hahn).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ ROBERT J. SAMUELSON, *THE GOOD LIFE AND ITS DISCONTENTS* 170 (1995) (citing OMB, *supra* note 42, at 28).

⁵² SAMUELSON, *supra* note 51, at 170.

⁵³ See, e.g., The Unfunded Mandates Reform Act, 2 U.S.C.A. § 1501 (West Supp. 1995), was a key part of the *Contract*. Cf. GINGRICH ET AL., *supra* note 2, at 133. The Act pertains when a federal statutory, regulatory, or judicial action mandates spending in excess of \$100 million by state, local, and tribal governments or by the private sector. 2 U.S.C.A. § 1532. In such cases, Congress would either have to provide the funding for these costs or vote affirmatively not to do so. 2 U.S.C.A. § 1514 (Supp. II 1995).

⁵⁴ See, e.g., S. 343, 104th Cong., 1st Sess. § 4 (1995) (as reported by the Senate Committee on Governmental Affairs). In addition, this Congress has enacted a requirement that agencies prepare cost-benefit analyses for any regulations imposing annual burdens of \$100 million or more on state, local, or tribal governments or the private sector. Unfunded Mandates Reform Act of 1995, 2 U.S.C.A. § 1532. Further, the Unfunded Mandate Reform Act of 1995 also provides that the least costly regulatory alternatives be used or that an explanation be given if it is not. § 1535.

sis,⁵⁵ using regulatory budgets,⁵⁶ enhancing judicial review,⁵⁷ enacting takings legislation,⁵⁸ and imposing regulatory sunsets.⁵⁹

Each of these proposals would provide a brake on regulatory excess by requiring a more careful consideration of the costs of regulation. However, they fall short of what I have argued is the paramount goal of regulatory reform: restoration of Congress's accountability for rules and regulations. Two of the proposals—unfunded mandates reform and regulatory budgets—would force the federal government to itemize or even to pay for the full cost of big government regulations but fail to address the problem of delegation directly. The rest of the proposals rely on either the judiciary or a more cost-aware executive branch for control of the regulatory process.

Therefore, while each of the foregoing proposals has merit, I favor a more profound structural change in the way that regulations are made in this country. I start with two premises: first, under our Constitution, Congress is the supreme maker of laws;

⁵⁵ See, e.g., S. 291, 104th Cong., 1st Sess. § 205 (1995) (as reported by the Senate Committee on Governmental Affairs). On the methodologies of "risk analysis" and "risk assessment," see generally LINDA-JO SCHIEROW, CONG. RES. SERV., ISSUE BRIEF IB94036, THE ROLE OF RISK ANALYSIS AND RISK MANAGEMENT IN ENVIRONMENTAL PROTECTION 1-2 (1996).

⁵⁶ See, e.g., S. 291, 104th Cong., 1st Sess. tit. III, § 7 (1995) (as reported by the Senate Committee on Governmental Affairs). A regulatory budget, in its milder version, would simply serve as a way to allow lawmakers to understand the true costs of regulations when making laws and overseeing agencies. Thus, the current process would continue unaltered, but more enlightened decisionmaking would result.

⁵⁷ S. 343, 104th Cong., 1st Sess. § 5 (1995) (as reported by the Senate Committee on Governmental Affairs) (amending 5 U.S.C. § 706(2) to provide for "hold[ing] unlawful and set[ting] aside agency action, findings and conclusions . . . without substantial support in the rulemaking file, viewed as a whole, for the asserted or necessary factual basis, as distinguished from the policy or legal basis, of a rule adopted in a proceeding subject to section 553").

⁵⁸ See, e.g., H.R. 925, 104th Cong., 1st Sess. (1995) (as passed by the House). The Takings Clause of the Constitution protects individuals' property rights from government intrusion with the guarantee of "just compensation." U.S. CONST. amends. V, XIV. However, the courts have construed this requirement narrowly in the context of regulatory takings. As one observer has put it, "[t]o date . . . the Court has never found a regulatory taking in the absence of a governmental physical invasion of land or a virtually total elimination of a tract's economic use." ROBERT MELTZ, CONG. RES. SERV., REPORT 95-200A, THE PROPERTY RIGHTS ISSUE 1 (1995). Some lawmakers seek to remedy this problem by providing statutory relief that would compensate property owners whenever certain regulations substantially diminish a property's value. See, e.g., H.R. 925, 104th Cong., 1st Sess. § 3 (1995) (as passed by the House).

⁵⁹ Sunset provisions would require agencies to reconsider—and sometimes to repeal—regulations for them to have continuous effect. For instance, some bills include a sunset provision that would require that rules expire after a fixed number of years. See, e.g., H.R. 994, 104th Cong., 1st Sess. (1995) (as reported by the House Committees on the Judiciary and Government Reform and Oversight). The underlying premise is that it is easier to stop a bad regulation from being reenacted than to kill it outright.

second, regulations are merely laws enacted by someone other than Congress. I believe that in order to restore the type of oversight that it once exercised over regulations, Congress must positively enact significant rules, even though the Court's decision in *Chadha* has made this more difficult. At the same time, it would be highly undesirable, and probably impossible, for Congress itself to undertake the task of promulgating regulations. The remedy, then, is to enact a law requiring that Congress approve rules before they could go into effect.⁶⁰ Congressional approval would provide a political check on the process, thus enhancing its democratic legitimacy while maintaining the advantages of agency technical expertise. The issue is how to provide for this approval. I propose to import a solution, which is tailored to constitutional requirements, from the states—the Joint Committee on Administrative Rules.

Before coming to Congress, I served on the Michigan Joint Committee on Administrative Rules (JCAR) in the state legislature. This body, established in the Michigan Constitution⁶¹ and Michigan's Administrative Procedures Act,⁶² was comprised of a few Senators and Representatives from each party, including myself. JCAR would review rules to be promulgated by departments and agencies. If the members did not feel that the rules appropriately reflected the legislature's intent when drafting the underlying legislation, JCAR could vote the rules down and effectively veto them. Almost all other states have similar bodies.⁶³ While there have been some problems with these state JCARs (mostly in keeping up with the agencies), these have mostly stemmed from a lack of staff and the part-time nature of

⁶⁰ See, e.g., Stephen G. Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785, 793–94 (1984) (arguing that Senate rules should provide a special fast-track for laws that confirm regulations as a substitute for the legislative veto); Elliott H. Levitas & Stanley M. Brand, *Congressional Review of Executive and Agency Actions After Chadha: "The Son of Legislative Veto" Lives On*, 72 GEO. L.J. 801, 804–07 (1984) (arguing for a wait-and-see procedure combined with an expedited disapproval resolution as a substitute for the legislative veto); Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 18–20 (1984) (arguing that "a law declaring that no administrative agency rule would take effect until affirmatively approved by a joint resolution of Congress and presented to the President" would be constitutionally valid).

⁶¹ MICH. CONST. art. IV, §§ 17, 37.

⁶² MICH. COMP. LAWS § 24.235–.235a (1994).

⁶³ As of 1990, 41 states had similar bodies. NATIONAL CONFERENCE OF STATE LEGISLATURES, REDRESSING THE BALANCE App. A (1991).

many legislatures. Neither of these problems are pertinent to Congress.⁶⁴

Because of *Chadha*, such a system cannot be enacted at the federal level. To allow a committee the power to veto administrative rules prior to their enactment would run afoul of the Constitution's Presentment Clause. Therefore, we must adopt an alternative system to allow similar legislative oversight.

My bill, H.R. 2990, would substantially accomplish this oversight goal by altering the rules that govern the House and the Senate, as well the congressional practice of delegating rulemaking authority to agencies and departments. Under my proposal, significant new regulations would require approval by a joint resolution of Congress before they would become effective.⁶⁵ Thus, Congress would affirmatively enact such rules by adopting a resolution that would have to be presented to and signed by the President to become effective.⁶⁶

Only significant regulations would be enacted into law by Congress. Minor regulations, which would not give rise to major concerns, would continue to be promulgated by the departments and agencies as they currently are under the APA. The decision whether regulations could be promulgated directly by the agency or whether they would have to be enacted by Congress would be decided by the initial enabling statute, which would delineate which regulations would go through which process—agency or congressional enactment.⁶⁷ This would enable Congress to give the most important regulations the highest priority and to keep

⁶⁴ Letter from Roger Garcia, Cong. Res. Serv., to author (Apr., 27, 1996) (on file with the author), citing Telephone Interview with Tom Sherman, Executive Director of the Ohio Joint Committee on Agency Review, Ohio State Legislature (Spring 1995).

⁶⁵ H.R. 2990, 104th Cong., 2d Sess. § 4 (1996).

⁶⁶ A similar concept is embodied in a recently enacted law, P.L. 104-121, 104th Cong., 2d Sess. §§ 251-253 (1995). The new law delays the implementation of a major rule, giving Congress time to pass a resolution rejecting the rule. The resolution would have to pass both houses and be signed by the President. Realistically, however, the President is unlikely to veto a rule that was promulgated by his administration. See *supra* notes 14-17, 22 and accompanying text. Without the President's approval, Congress would need a two-thirds supermajority to block proposed rules. Furthermore, since the bill does not require an affirmative vote by Congress to allow major rules to take effect, it does not solve the other major problems discussed above that arise when civil servants pass laws instead of Congress. See *supra* notes 14-27, 28-32 and accompanying text. Representative J.D. Hayworth (R.-Ariz.) has also introduced similar legislation, H.R. 2727, 104th Cong. 1st Sess. §§ 3-4 (1995) (as introduced in the House).

⁶⁷ H.R. 2990, *supra* note 65, § 6.

the direct responsibility for their enactment, and also would not violate the constitutional requirements of *Chadha*.

To ensure speedy consideration of the proposed regulations, the House and Senate procedural rules would be modified so that regulations would be subject to fast-track treatment in each house. Where an agency had been given the power to suggest major regulations, the agency would draft the regulation and send it to the Congress.⁶⁸ This would automatically create a resolution introduced by the Majority Leader that would go to the jurisdictionally appropriate committee.⁶⁹ The committee would have a limited time either to report it as forwarded by the agency or department, or to vote affirmatively not to report it.⁷⁰ If the committee did neither within a certain amount of time, the resolution would proceed automatically to the floor.⁷¹ Once on the floor, an up or down vote (i.e., no amendments would be permitted) would have to be taken within a certain amount of time.⁷²

Where agencies and departments could promulgate minor regulations as they do now, a petition could be introduced in either the House or Senate that would subject them to the same-day fast-track process.⁷³ In order to get a resolution on the fast track in either chamber, a fixed number of members would have to sign a petition.⁷⁴ Previously enacted regulations would also be subjected to this provision.⁷⁵ That way, burdensome regulations could be repealed in a reasonably efficient manner.

The effect of such a system would be substantial. Fewer onerous regulations would surely result because of the congressional approval requirement. Congress would be loath to pass regulations that are too burdensome for fear of electoral reprisal—a fear not shared by agencies. This hesitancy would force agencies to consult closely with the lawmakers who wrote the enabling statute to ensure that the proposed regulations were of the nature envisioned by Congress if they hoped to get them enacted. Additionally, this would serve the very useful purpose of bringing the agencies and Congress in closer cooperation. Finally, by making Congress enact regulations, we would restore

⁶⁸ *Id.* § 3(b).

⁶⁹ *Id.* § 4(a)-(b).

⁷⁰ *Id.* § 4(b)(1).

⁷¹ *Id.*

⁷² *Id.* § 4(b)(2)-(3).

⁷³ *See id.* § 5.

⁷⁴ *See id.* § 5(d)(2).

⁷⁵ *Id.* § 5(a).

not only lost congressional authority, but the responsibility that accompanied it. By placing regulatory power once more into the hands of officials that ordinary citizens could speak with, influence, and vote for, those citizens would retain more control over their lives. This is the real change that is needed in the Washington regulatory arena.

CONCLUSION

As attorney Philip Howard has written:

Regulatory reform will be comprehensive only when responsibility itself becomes the touchstone. Nothing fancy is required to make it a success. When Americans can identify who is responsible for what, sensible decisions will begin popping out of our schools and other institutions like spring flowers after a long winter. And when things don't work, everyone will know the right question: Who has the responsibility?⁷⁶

By positively enacting regulations rather than giving the agencies the responsibility, we can make the Federal government more accountable to the people it serves. People will regain control over their lives, since their elected representatives will exercise more effective oversight of those who create most of the laws under which we live. H.R. 2990 is a good first step towards restoring the people's faith in the federal government.

⁷⁶ Philip K. Howard, *The Resurrection of Common Sense*, WALL ST. J., Jan. 17, 1996, at A14.

Mr. GEKAS. I ask the gentleman to remain for questions afterwards.

Mr. SMITH of Michigan. Thank you.

[The prepared statement of Mr. Smith of Michigan follows:]

PREPARED STATEMENT OF HON. NICK SMITH, A REPRESENTATIVE IN CONGRESS FROM
THE STATE OF MICHIGAN

Chairman Gekas and members of the subcommittee, thank you for holding these hearings and allowing me to testify this morning. In light of Senate Majority Leader Trent Lott's comments last week on the need to shift the focus away from creating new laws to increased oversight and improving the legislative process, they are very timely. I have participated in the creation of regulations at both the federal and state level and taken part in the legislative oversight of rulemaking in Michigan. As a Member of Congress, I believe that we need to increase our oversight and control of the process at the federal level to ensure that administrative regulations are consistent with legislative intent by actually enacting some regulations. My model of reform is Michigan's legislative Joint Committee on Administrative Rules (JCAR) which could veto regulations and which I chaired as a State Senator.

I would like to preface my remarks by making a few observations.

First, I do not challenge the need for a large degree of agency rulemaking. After all, as professors Breyer and Stewart have noted, "Modern government is administrative government."¹ Given the current size and scope of government, it is not feasible to go back to the pre-New Deal era in terms of agency rulemaking.²

Second, most rules are appropriate and do not infringe on Congress's authority. Rules can implement, interpret or prescribe law.³ Those which merely implement the law deal with the mundane and routine aspects of administering (enforcing) the law. They comprise a large number of federal regulations and can frequently be desirable as they restrict the discretion, and hence the power, of bureaucrats.⁴ It is not these rules, but rather those that interpret statutes and actually prescribe new rights and duties which deserve more careful scrutiny than they currently require.⁵

Third, we have already taken a step towards this goal by amending to the Administrative Procedure Act to allow Congress to pass a joint resolution disapproving new rules. Such a joint resolution would have to be passed by both houses and signed by the President.⁶

Regularly, Members of Congress receive the Federal Register. Few of us have any idea of what is actually inside it. The Register contains the text of proposed and final rules, notices pertaining to the rulemaking process, and other information from the regulatory agencies. Needless to say, we in Congress could not produce a daily book of new laws governing the conduct of the American people, nor should we ever want to. But, it does remind me that Congress is no longer the major source of lawmaking in the United States. Those who practice law at the federal level are often more concerned with the Code of Federal Regulations than the United States Code and with good reason.⁷

What Mr. Taylor, Mr. Hayworth and I propose is that Congress's role over the rulemaking process be strengthened. Although our proposals vary over which regulations need to be subjected to oversight and the details of the process, we are united on the proposition that Congress should actually pass major regulations rather than letting them take effect with only a notice in the Federal Register.

Our current delegation of legislative responsibilities is dangerous for many reasons. It severs the link between the source of political legitimacy and political action, leads to less rational and informed lawmaking, sometimes thwarts Congress, and encourages sloppy lawmaking. As a result, we have the horror stories that fill newspapers and journals, enraging citizens, damaging our economy and lowering our standard of living. It is my hope that by enhancing Congress's role in the regulatory process, we can restore some respect to our governing process, improve the quality of the regulatory process and reestablish Congress's responsibility for the direction of our country.

Rulemaking empowers bureaucrats by giving them the discretion to legislate interstitially. Although top ranking civil servants are appointed by, and hence, accountable to the President, those who actually make the rules are not. Hence, their connection with the source of political legitimacy in our society, the people, is suspect at best. When rules which tell people how they can and cannot use their property are made by those they cannot vote for, the result is frustration with a government seen as "out of touch." At worst, it can lead to a lack of respect not only for Congress and the regulatory agencies, but the law itself. As one columnist has written, "The question that arises from any discussion of government regulatory ex-

cesses is whether one major reason for declining respect is the huge spawn of unnecessary and unreasonable laws. Many are simply bureaucratic decrees that have never been screened by any legislative body."⁹

Unlike lawmakers who are frequently in their districts holding town hall meetings and corresponding with people from all walks of life, bureaucrats are mostly insulated from the activities that they regulate. It is not surprising, then, that we get some rules that are inconsistent with congressional intent and which we have begun to address in the House's new "Corrections Day" process. Had we in Congress seen some of these rules in the first place, there would be less of a need to correct them.

I also believe that the political process that occurs in Congress is superior in accommodating the needs of society at large to the agency rulemaking process. At the beginning of the 104th Congress, we voted to apply to ourselves the same rules that we have asked the American people to live under. As a result, we have discovered that some of them simply do not work well.¹⁰ I believe that the extension of congressional authority over rulemaking has a similar effect. Bureaucrats who write rules rarely are affected by them and this alters their perspective on the effectiveness and rationality of proposed rules. Our closer communications with voters gives us in Congress a greater incentive to balance the costs equitably among our constituents because we have an interest in reaching amicable solutions.

Also, bureaucrats attempt to "end run" Congress when they write rules to implement laws they disagree with. I know this because we used to do it when I worked in the Agriculture Department. It's amazing how agency regulations can dramatically alter the effect of the underlying statute. This is still going on to some degree. One example is the statements on the regulations that will come out of Health and Human Services to implement the new welfare bill.

The last reason that Congress should exercise more oversight over significant rules is that they have a dramatic impact on the economy. A new study released by the Center for the Study of American Business at Washington University concludes that the dramatic increase in regulations since the mid 1960s is the primary cause for the slowdown in labor productivity which started at the same time. The study attributes 50% of the slowdown in long term productivity growth from 1963-1993 to increased regulation and estimates that without this increase, our GDP would be about 20% higher.¹¹

I do not mean to imply that all of these rules are bad simply because they slow down growth. Some have been beneficial. Yet, all regulations have costs and some have enormous costs. In some cases involving health rules, more lives can be saved by spending money on other areas. For instance, the Heritage Foundation has reported that one regulation, the chloroform private well emission standard, has a cost per life year saved of \$99 billion. At the same time, were we to spend \$92 billion, we could quadruple spending on cancer research for the next 12 years. My point is simply that the elected representatives in Congress should be making these examinations rather than career civil servants.

Until 1983, all of this was less of a problem. The legislative veto allowed one or both houses of Congress, or even a committee, to block an executive branch action through a simple vote. The Supreme Court struck this procedure down, however, in *INS v. Chadha*¹² and hence it is no longer available to us.

My solution to these problems, H.R. 2990, establishes a system for Congress to use when it fears that bureaucrats have too much potential to abuse a particular delegation of power. Under my bill, delegations of power could be granted with the proviso that any regulations pursuant to the delegation would need to be approved by Congress on a fast track system. These regulations would not go into effect until Congress had approved a joint resolution approving them. The resolution would go through the appropriate committee in each house and would have to be voted down by the committee (thus replicating the Michigan JCAR) or it would go to the floor automatically. After coming to the floor, the house of Congress would have to vote up or down on the regulation. After each house passed it, it would be sent to the President.

This is not a truly new proposal. Variations have been around since Chadha. They have broad and bi-partisan support in the academic and policy communities.

Unlike the Hayworth and the Taylor bills, my proposal does not require Congress to approve every regulation. Rather, it merely establishes a process to be used in the future if Congress so wished. Further, it has a 90 legislative day timetable ensuring prompt consideration of submitted regulations. These provisions should alleviate concerns that the review process would tie Congress up or bring the regulatory process to a halt. Further, the mere presence of such a device would lead to closer cooperation between Congress and rulemakers.

Another feature of my particular bill is that it has a provision dealing with existing regulations. Legislation to repeal existing regulations could also be placed on the 90 day fast track if enough members signed a petition in the House or Senate. Because repeal would need either Presidential approval or $\frac{2}{3}$ support in Congress to pass, only those regulations which suffered a broad range of antipathy would be susceptible to repeal.

In conclusion, we need to restore Congress's role as the primary lawmaker in America, instead of its current place as just one of many actors which affect the regulatory process. These are major initiatives and need to be studied carefully by both this subcommittee and the full Judiciary Committee. Further, the provisions enacted in P.L. 104-121 need to be monitored for effectiveness.

I believe that the review and study of this subcommittee will prepare Congress to move ahead and strengthen Congress's position over the regulatory agencies. I look forward to assisting in this process.

ENDNOTES

1. Breyer, Stewart, *Administrative Law and Regulatory Policy*, p. 1.
2. See, e.g., DiIulio, *Why Bureaucratic Discretion is a Problem*, AEI Conference Paper #6053, Jan. 17, 1996, p. 5: "At this stage of America's history, persuasive jurisprudential arguments for ending delegated authority are about on a par with neo-Anti-Federalist challenges to the Supreme Court's monopoly on judicial review, or neo-Confederate odes to nullification and succession."
3. Kerwin, *Rulemaking*, p. 5.
4. DiIulio, *supra* n. 2 at pp. 5-9. This point is contrary to the school of thought currently in vogue that contends that the problem of the administrative state is the rules which bind the bureaucrat's discretion. A common and popular exposition of this argument can be found in Howard, *The Death of Common Sense*.
5. Examples of the latter include The Clean Air Act, Kerwin, *supra* n.3 at 1, and OSHA, *Ibid.*, at 6.
6. P.L. 104-121, 251-253. Although I voted against this bill because it contained an increase in the public debt limit (see §301) to \$5.5 trillion, I supported these amendments to the APA.
7. In 1995 the Code of Federal Regulations was approximately 134,000 pages compared to the United States Code which was about 33,000 pages.
8. For a discussion of the basis of the political legitimacy of governing see, *inter alia*, Smith, *Restoration of Congressional Authority and Responsibility Over the Regulatory Process*, Harvard J. on Legis., summer 1996, Vol. 33, No. 2, pp. 324-329. Even professor DiIulio, a self described "neo-progressive public administration scoundrel," whose solution to the problem of bureaucracy is what he calls "performance management" acknowledges:
 "Stated simply, even if one accepts that political leaders do pretty much what the voters want, and, in turn, that the heads of public bureaucracies normally honor the authoritative wishes of their political superiors and overseers, the problem of bureaucratic discretion is still an overpowering one. For unless the leaders of government bureaucracies can get their armies of subordinates to perform as desired, the crucial last link in the democratic chain is broken." DiIulio, *supra* note 2, at 16.
9. George Melloan, *Federal Regulation and the Crisis of Legitimacy*, Wall St. J., Aug. 19, 1996, A13.
10. e.g., the Fair Labor Standards Act (FLSA) 29 U.S.C. §201 et seq. Many of us have found that the provisions regarding overtime are onerous and that the definitions of those exempted are absolutely incomprehensible. This experience has certainly heightened our interest in legislation such as the Working Families Flexibility Act (H.R. 2391) because we can actually see the problems created by the FLSA at work in our own offices.
11. Vedder, *Federal Regulation's Impact on the Productivity Slowdown: a Trillion-Dollar Drag*, Center for the Study of American Business Study #131, July 1996, pp. 16-18. Vedder has estimated that an undiscussed effect of regulations is their propensity to misallocate resources. He has estimated that the true cost of regulations is closer to \$1.8 trillion per year, substantially above the \$600 billion figure cited by most economists, due to these misallocations.
12. 462 U.S. 919 (1983).

Mr. GEKAS. And now we turn to the gentleman from Arizona, who serves on Banking and on Veterans Affairs.

STATEMENT OF HON. J.D. HAYWORTH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. HAYWORTH. Mr. Chairman, I thank you very much for this opportunity, and I also thank the distinguished ranking member, the gentleman from Rhode Island. I appreciate his attendance this morning. I understand the challenge of scheduling conflicts that exist and also lament the fact that he hopes to go to the other side of this Hill. We like working very much with Mr. Reed.

And, Mr. Chairman, members of the subcommittee, and distinguished guests, I'd ask unanimous consent that my complete testimony be included in the record.

Mr. GEKAS. Without objection, it will be so ordered,. As a matter of fact, all the statements of all the witnesses will be included automatically in the record without objection.

Mr. HAYWORTH. Thank you, Mr. Chairman.

The beauty of our Constitution I believe, sir, is found in its simplicity and straightforward description. And after the beautiful preamble to our Constitution, the first clause in article I, section 1, reads, "All legislative powers herein granted shall be vested in a Congress of the United States." But, as we've seen in recent history, Mr. Chairman, Congress has ceded its lawmaking authority to unaccountable, unelected employees in the executive branch. Not only does this contradict the Constitution's separation of powers by making the executive branch the maker and enforcer of what, in essence, are laws, but it violates article I, section 1, of the Constitution which I just read to you.

For the first 150 years of our Republic, the Supreme Court held that the transfer of legislative powers to another branch of Government was unconstitutional, but in the late 1930's the Court reversed itself, upholding laws by which Congress merely instructed agencies to make decisions that served "the public interest." And since then, Congress has ceded its basic legislative responsibility to executive agencies that craft and enforce regulations with the full force of law.

Mr. Chairman, at this juncture, an acknowledgment: "J.D." in my name does not stand for juris doctor. I am not a lawyer, nor have I played one on television, but it doesn't take a great leap of faith or logic to realize that the regulations enumerated by this alphabet soup of acronyms within the executive branch, because these regulations carry with them the sanctions of fines or imprisonment or both, in essence, these regulations are laws. And to that degree, having the regulations formulated by the unelected simply sets up the tyranny of the bureaucracy, if you will, and it creates a very unfortunate situation.

Now for those folks who come to serve in this body who perhaps look at these endeavors as an establishment of a career, for those who would be lifetime legislators or professional politicians, I guess the situation is not too bad because it allows folks to have their cake and eat it, too. For example, we in the Congress can draft laws that offer broad and ambiguous notions of actions to be taken. For example, as my colleague from Michigan mentioned his involvement with the Occupational Safety and Health Administration, the laws that we have here call for "reasonable, necessary, or appropriate standards to provide safe and healthful employment," allowing the Secretary of Labor and employees within the Labor Department to decide what that means.

The Clean Water Act's mandate to protect "navigable rivers" permits the Army Corps of Engineers and the EPA to exercise control over any land that has a certain minimum water content. And you referred to my time on the Banking Committee. By law, commercial banks can only affiliate if they are "well capitalized," a vague determination made by the Federal Reserve Board and the FDIC.

So what we have done here is to establish broad parameters that allow regulators to carry to another level the definition of what laws should be, and, in fact, we've allowed the unelected to make and enforce the laws. For some folks who hope to be career politicians, I guess it allows them to have their cake and eat it, too, to, on the one hand, pass laws and then turn around and rant and rave and object to the very bureaucracies that have been created in the wake of these laws, and I think that's very unfortunate.

So what I've asked my colleagues to do is to stand behind my piece of legislation, H.R. 2727, the Congressional Responsibility Act, which will rightly return legislative powers to the Congress by requiring Congress to vote on all rules and regulations, as defined in section 551, subsection 4, of title 5 of the United States Code, except those regulations of particular applicability, any interpretative rule, general statement of policy, or any regulation of agency organization, personnel, procedure, or practice. My legislation applies only to new regulations and will not be retroactive.

Now detractors will say there's no way that Congress has the time to review all rules and regulations that are promulgated by the executive branch, but, Mr. Chairman, I think this is important. Regardless of the time implications, it is the duty of Congress to review rules and regulations, as enumerated in article I, section 1, of the Constitution.

Further, I have had the honor often in this Congress of serving as Speaker Pro Tem, and on more than one occasion I've presided over largely ceremonial debate in which we have taken a great deal of time to name Federal installations after noteworthy Americans. I don't indict that process, Mr. Chairman, but I'd simply ask, if we take the time in this Congress to name courthouses, airports, military bases, and other places after noteworthy Americans, shouldn't we take the time to vote on rules and regulations which profoundly affect our Nation's citizenry, and shouldn't we take the time to live up to article I, section 1, of the Constitution?

Mr. GEKAS. Maybe we should take the special orders time and transfer it to—

Mr. HAYWORTH. That's, indeed, a possibility, Mr. Chairman, that we can explore. With the time constraints in mind, however, the Congressional Responsibility Act provides an expedited procedure for considering rules and regulations. Within 3 days after an agency promulgates a rule, the majority leader of both the House and the Senate, by request, must introduce a bill comprised of the text of the regulation. If the bill is not introduced in 3 days, any Member thereafter may introduce the bill. The bill is not referred to a committee unless a majority of Members agree to send it through the normal legislative process. Within 60 days of being introduced, however, the legislation must come before the respective Chamber for a vote. The bill shall be limited to one hour of debate and cannot be amended. If a majority of Members of the body vote for the bill, it is sent to the other body for approval. Upon approval of both bodies, the legislation would then be sent to the President to sign or to veto.

Other opponents of the legislation, Mr. Chairman, might argue this would delay the implementation of rules and regulations. In reality, though, it would not. Rules and regulations are often the

subject of countless and endless lawsuits. For example, the final rule for leaded gasoline took nearly 10 years to promulgate because it was the focus of intense litigation. Congress becomes the final arbiter in rulemaking, and the Congressional Responsibility Act states that a regulation contained in a bill is not an agency action for the purpose of judicial review under chapter 7 of title 5, United States Code. This would bring to a halt endless litigation that delays implementation of regulations.

And, finally, opponents of nondelegation would say that it's a back-handed attempt at regulatory reform, but the Constitution makes clear that all legislative powers shall be vested in Congress. Article I asserts that this legislative power includes the power to regulate. By returning the power to regulate to the Congress, we'll make Congress accountable to the people for Federal laws.

Mr. Chairman, in my opinion, delegation is one of the root causes of the American people's disenchantment with government, and we can take a step in the right direction by ending this unconstitutional delegation of powers. By taking this step, we will help restore confidence and integrity to the Federal Government. I think it is vitally important that we do so.

I thank you for the time to testify this morning. I thank my colleagues for joining us here. I look forward to any questions you may have.

[The prepared statement of Mr. Hayworth follows:]

PREPARED STATEMENT OF HON. J.D. HAYWORTH, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF ARIZONA

Mr. Chairman, members of the subcommittee, and distinguished guests, thank you for affording me this opportunity to discuss one of the most important fundamental reforms this Congress can undertake: ending the unconstitutional delegation of legislative powers. For too long, Congress has ceded its law-making authority to unaccountable, unelected employees in the executive branch. Not only does this contradict the Constitution's "separation of powers" by making the executive branch the maker and enforcer of laws, but it violates Article I, Section 1 of the Constitution, which states that, "All legislative powers herein granted shall be vested in a Congress of the United States." My testimony today will focus on the unconstitutionality of delegation and why it makes for bad government.

As the founder and Chairman of the Constitutional Caucus, a bipartisan organization with over 100 members, I am committed to upholding the principles of the Constitution. I believe our Founders understood the negative implications of delegation of powers. For this reason, the Founders defined the various roles of the three branches of government and emphasized their "separation of powers."

For the first 150 years of our republic, the Supreme Court held that the transfer of legislative powers to another branch was unconstitutional. In the late 1930s, however, the Court reversed itself, and upheld laws by which Congress merely instructed agencies to make decisions that served "the public interest." Since then, Congress has ceded its basic legislative responsibility to executive agencies that craft and enforce regulations with the full force of law. The Supreme Court has not invalidated a single delegation of congressional power since 1935. Unfortunately, law-making was never intended to be in the hands of executive branch employees. As the Constitution enumerates, the power to make laws was solely vested in Congress, because Congress is directly accountable to the people.

Today, the evidence abounds that Congress has slipped from its constitutional moorings. The Americans With Disabilities Act tells employers to make "reasonable accommodation" of handicapped workers unless there is an "undue hardship," but leaves it to the Department of Justice to determine what is reasonable (and required).

Similarly, the Occupational Safety and Health Administration (OSHA) calls for workplace standards that are "reasonable, necessary or appropriate to provide safe and healthful employment" but allows the Secretary of Labor to decide what that means. The Clean Water Act's mandate to protect "navigable rivers" permits the

Army Corp of Engineers and the Environmental Protection Agency (EPA) to exercise control over any land that has a certain minimum water content. By law, commercial banks can only affiliate if they are "well capitalized," a vague determination made by the Federal Reserve Board and the Federal Deposit Insurance Corporation (FDIC).

Thus, delegation gives life to bad laws because it allows legislators to make ambiguous laws for which they can take credit without taking responsibility for legal consequences or their costs. Essentially, delegation allows Congress "to have its cake and eat it too." Congress can reap the benefits of delegation and its excesses by helping constituents through the complexities of federal regulations. At the same time, it can blame bureaucrats for misinterpreting its intentions. The legislator can play both sides and win. Unfortunately, the loser in all of this is the electorate, because they are forced to pay for these excesses. If Congress acted constitutionally, it would have the ultimate responsibility for crafting these laws.

With delegation, we also sacrifice accountability in government. Originally designed to be the most accountable branch of government, Congress has grown increasingly irresponsible. The fundamental link between voter and lawmaker has been severed by unelected regulators hiding behind bad laws. A handful of broadly written laws has spawned an alphabet soup of government agencies and an overwhelming regulatory burden that undermine the very idea of representative government. Many regulatory analysts believe more consequential law is generated in the executive branch than in the legislative branch. Even the Federal Register, which churned out 3,544 rules and regulations last year, admits that Congress has ceded much of its law-making ability to the executive branch. In the explanation of the Federal Register's purpose, it states that it "provides a uniform system for making available to the public regulations . . . having legal effect."

Finally, delegation allows powerful special interests to expend substantial resources in private to benefit the few at the expense of many. Simply put, if we are to restore integrity, responsibility, and confidence to the federal government, one of the best ways we can do this is by ending the unconstitutional delegation of legislative powers to the executive branch.

The Founders knew that law-making authority vested in Congress would make for good government because our elected officials would be directly accountable to their constituents. I have conducted a survey in my district, and often I take informal polls where I visit. I ask a basic question: Do you believe unaccountable employees in the executive branch should have the power to make laws? To this day, I have not heard one person answer this question in the affirmative. My constituents understand the ramifications of granting broad powers to the executive branch to make laws. Yet, to the chagrin of most of my constituents, this is the case in America today. It is no wonder why my constituents, and the American people, are so disillusioned with government.

Congressman Smith, Congressman Taylor, and I, along with Congressman Brewster, each have introduced or cosponsored legislation that would end delegation of legislative power to the executive branch. We all represent vastly different regions of the country with various interests, and we all have constituents who have been adversely affected by this unconstitutional lawmaking. We agree that it should be Congress's duty to review rules and regulations that affect our constituents and which are, in essence, laws. Although we differ slightly on the approach to end delegation, we all agree that Congress should take back its constitutionally-granted power to enact laws.

On December 6, 1995, I introduced H.R. 2727, the Congressional Responsibility Act. This legislation will rightly return legislative powers to the Congress by requiring Congress to vote on all rules and regulations, as defined in section 551(4) of title 5, United States Code, except those regulations of particular applicability, any interpretive rule, general statement of policy, or any regulation of agency organization, personnel, procedure, or practice. My legislation will apply only to new regulations and will not be retroactive.

Detractors will say that there is no way that Congress has the time to review all rules and regulations that are promulgated by the executive branch. Regardless of the time implications, it is Congress's duty to review rules and regulations, as enumerated in Article I, Section 1 of the Constitution. However, I have frequently had the honor and privilege of serving as Speaker Pro Tempore. On more than one occasion, I have presided over largely ceremonial debate in which we took several hours to name federal installations after famous Americans. I ask you: If we can name courthouses, airports, military bases, and other places, don't we have enough time to vote on rules and regulations which profoundly affect the citizens of this country?

With these time constraints in mind, however, the Congressional Responsibility Act provides an expedited procedure for considering rules and regulations. Within

three days after an agency promulgates a rule, the Majority Leader of both the House and Senate (by request) must introduce a bill comprised of the text of the regulation. If the bill is not introduced in three days, any Member thereafter may introduce the bill. The bill is not referred to a committee unless a majority of Members agree to send it through the normal legislative process. Within 60 days of being introduced, however, the legislation must come before the respective chamber for a vote. The bill shall be limited to one hour of debate and cannot be amended. If a majority of Members of the body vote for the bill, it is sent to the other body for approval. Upon approval of both bodies, the legislation is sent to the President to sign or veto.

Other opponents of this legislation might argue that this would delay the implementation of rules and regulations. In reality, though, it would not. Rules and regulations are often the subject of countless and endless lawsuits. For example, the final rule for leaded gasoline took nearly 10 years to promulgate because it was the focus of intense litigation. Congress becomes the final arbiter in rule-making and the Congressional Responsibility Act states that a regulation contained in a bill is not an agency action for the purpose of judicial review under chapter 7 of title 5, United States Code. This would bring to a halt endless litigation that delays implementation of regulations.

Finally, opponents of delegation will say that this is a backhanded attempt at regulatory reform. The Constitution makes clear that all legislative powers shall be vested in Congress. Article I asserts that this legislative power includes the power to regulate. By returning the power to regulate to Congress, we will make Congress accountable to the people for federal laws. This will make for better government, a laudable goal which we, as well as the American people, desire.

In my opinion, delegation is one of the root causes of the American people's disenchantment with government. We can take a step in the right direction by ending unconstitutional delegation of powers. By taking this step, we will help restore confidence and integrity to the federal government. Many people agree with this analysis, and that is why the concept of non-delegation is embraced by both liberals, such as Nadine Strossen of the American Civil Liberties Union (ACLU), and conservatives, such as Judge Robert Bork. In fact, it was now-Justice Stephen Breyer who wrote in 1984 how the legislative veto should be replaced by an expedited procedure for Congress to pass rules and regulations.

I want to end my testimony by quoting John Locke's admonition that "the legislative cannot transfer the power of making laws to any other hands." Delegation without representation is as wrong today as taxation without representation was in the 1700s. It is time Congress took back its constitutionally-granted power to make laws.

Again, I want to thank you Mr. Chairman, as well as the subcommittee members, for allowing me to have this opportunity to testify here today. This Congress has talked a lot about reform. I think that ending delegation of powers from the legislative to the executive branch could be the most important reform this Congress addresses. Mr. Chairman, I welcome any questions you, or any other members of the subcommittee, might have.

Mr. GEKAS. I thank the gentleman, and we turn to Charles Taylor, who is from the 11th District of North Carolina and is a member of the Appropriations Committee.

STATEMENT OF HON. CHARLES H. TAYLOR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Mr. TAYLOR OF NORTH CAROLINA. Mr. Chairman, may I have permission to move the books in front of me?

Mr. GEKAS. Yes, without objection, you may use any kind of tangible evidence of your presentation that you may require. Is that your diary? [Laughter.]

Mr. TAYLOR of North Carolina. It is. It is.

Thank you, gentlemen.

If I may stand, since it's more difficult to see the committee now. That is the 1993 Federal Registry, one year of the rules and regulations that the average small businessman is responsible to know. He must read it. It is the law. One might say we have gone from a nation of law to a Nation of administrative fiat.

I also would put along with that, a copy of the new version of the King James Bible, which has stood us in good stead for thousands of years, not just one, and you can see the difference and the fallibility of man over the scriptures.

It's important to discuss the legislation I introduced H.R. 47, the Regulatory Reform and Relief Act. This is the third Congress that I have presented this act or an act similar to it. I have no real disagreement with the other gentlemen's legislation. Essentially, we're seeking the same thing. We have some minor differences in procedure, but that the committee can consider and work out. But I think all three of us are pointing out the very important factor that 70,000 pages per year are put upon the American small business person, in many cases without any understanding. I was on a plane recently with two lawyers who represented two different sides who had just met with the bureaucracy on a new set of regulations, and none of them could interpret them or give a clear indication of what they meant. The lawyers were perplexed how they were going to advise their client on this matter.

Small business represents close to 90 percent of our jobs, small industries we'd call the mom-and-pop operations, and they're the ones who are charged with following a great portion of these regulations. Consequently, they do not have the staff or the ability to understand, much less be able to carry out in many cases, these very complicated regulations.

It's estimated that regulations cost approximately \$670 billion to American businesses in 1995, and small business takes the biggest hit, approximately \$5,500 per employee. What could we do to increase employment, what could we do to make job futures greater, if we could pare down the size of this great bureaucracy?

And, of course, sometimes these regulations, while well intended—and I'm not trying to criticize the intention at all—become totally ridiculous. For instance, one set of rules for a brick factory in Redding, PA, required it to send in a set of forms with its shipments of bricks describing for the workers how to identify a brick: a granular, solid, and essentially odorless in a wide range of colors—and giving it specific gravity, so that the employees would not be mistaken what they had in their hands. I would think that the brick manufacturer might have had a clue of what a brick would be, and you could call that language superfluous.

The recent book entitled, "The Death of Common Sense" states that in 1994 almost 20,000 citations in the name of safety were given for not keeping OSHA forms correctly, having nothing to do with public health and safety, but with the forms. I would also point out that, in a very serious situation in my State of North Carolina, in Hamlet, NC, a number of people died in a chicken processing plant because the fire doors were locked. A U.S. Department of Agriculture inspector for that plant had ordered the door be closed, and when the Imperial Co. that operated the plant said they would see that the door was locked the Federal inspector, signed off on the fact that that door had been locked. While we cannot expunge the Imperial Co. for its liability, certainly the cross-purposes of regulations had something to do with that tragedy.

I would also cite to you the Equal Employment Opportunity Commission (EEOC), Mr. Chairman, that in 1994, despite the en-

actment of the Religious Freedom Restoration Act, promulgated regulations to stop what it claimed would be the abuse of employees in the workplace for being religiously harassed. Now this had nothing to do with racial harassment or sexual harassment or any harassment based on discrimination of age or any other area recognized. This was religious harassment they feared would come into the workplace. So they promulgated rules that said there would be no religion in the workplace, and those rules would have prevented one from having a Bible at his desk. It would have prevented someone from wearing a cross. It would have prevented someone from inviting someone to come to church.

NASCAR drivers came to me and said, "We've just been told we're not going to be able to have our service at the track inside the pits every morning, usually on Sunday before the race, because that's the workplace, and it would be considered religious harassment." They made a very strong point: "We're going to get in a small piece of sheet metal about 5 x 10 and go 200 miles an hour around this track at 125 degrees, and you're saying we can't have a service or we can't pray before we get in that car? By what right does the U.S. Government have to tell us that?"

I sit on the Commerce, Justice, and State Appropriations Committee that oversees EEOC budget, and I put a small amendment in their budget that said none of their funds could be used to enforce these regulations, and it passed the Congress overwhelmingly, and the regulations were withdrawn. But how foolish do I feel as a Member of Congress having to take that action for something that was clearly ridiculous?

And so the case that I'm putting forward today—and I'm sure has been well put before by two other Members—is that the bureaucracy, unanswerable to the public, has moved ahead with an annual creation of this kind of verbiage that small businesses have to cope with every year, and many times those rules promulgated years after the Congress passes the legislation, go far beyond what the Congress intended. We could give a number of examples of that: the wetlands legislation, the Clean Water Act, and the wetlands that derived from it were never mentioned in the act, but it has caused a great deal of consternation. It was clearly a bureaucratic creation. Congress may well have wanted to do it. Congress may well have agreed to it, but Congress did not in the Clean Water Act address that question.

If we do not become totally mindless of what's coming out of Washington, then we as Congress, charged with the obligation of passing the laws of this country, and if these are the laws of the country, then we should, in fact, approve through a system of review before these are visited upon the American people—in the name of common sense and fairness and in good government. I think the people expect it, and I think it's time for us to do it.

Thank you for letting us have this presentation.

Mr. GEKAS. By all Means.

[The prepared statement of Mr. Taylor of North Carolina follows:]

PREPARED STATEMENT OF HON. CHARLES H. TAYLOR, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF NORTH CAROLINA

Chairman Gekas and members of the subcommittee, I would like to thank you for the opportunity to testify before you today. There has never been a more urgent need for regulatory reform as now. It is time for Congress to assume the responsibility that was granted to it under Article I, Section 1 of the Constitution which states that "all legislative powers herein shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." To this end, I have introduced H.R. 47, the Regulatory Reform and Relief Act which would require Congress to control the federal regulatory process by reviewing all rules and regulations that federal agencies propose. No rule or regulation would take effect until approved by both the House and Senate and signed by the President.

Since 1990, we have seen an increase in federal rules and regulations that have been issued by the Federal Government. To illustrate my point, I would direct you to the cart directly to my right. This is the Federal Register from 1993 which encompasses 61 volumes and 69,684 total pages. The 1993 Federal Register, which includes 3,207 proposed rule documents and 4,369 final regulatory documents, marks the largest edition since the 1980 edition, which was the largest Register in history. I believe this is an excellent example of what happens when Congress delegates regulatory authority to nameless and faceless bureaucrats who are not accountable to anyone affected by their actions.

As we have learned, the American public is growing increasingly disenchanted with our political system. Congress can take a big step toward regaining the faith and trust of Americans by passing true regulatory reform. Members of Congress have an obligation to protect the people who send us to Washington by reviewing all rules and regulations that are the result of the laws that we pass. We must take a more active role in the regulatory process to safeguard against rules which hurt our economy and small businesses. We must return America to a land of laws passed by its Congress and understood by its people.

Vaguely written laws requiring agency and departmental interpretation have led to a large increase in regulation. For example, the Clean Water Act has been interpreted by the Environmental Protection Agency to mean that it can prosecute people for disturbing wetlands, even though the law never mentions or defines a wetland. However, we cannot merely blame the bureaucrats. To an extent, lawmakers enjoy the best of both worlds. It is possible for Congress to write vague legislation and then require the federal agencies to interpret specific definitions, thereby relinquishing our responsibility to make difficult choices. However, when we ask agencies to do this we run the risk of the law going far beyond the original intent of the legislation.

Increased regulation, combined with a reduction in accountability and oversight is destroying American jobs. These additional regulations act as a hidden tax on employment and job creation by directly increasing the cost of employing workers. A new report issued by the Center for the Study of American Business states that the cost of regulatory compliance totaled an estimated 670 billion dollars in 1995. Unfortunately, it is small business that takes the biggest hit, with the average firm of under 20 employees paying over \$5,500 per employee in compliance costs.

Historically, it has been small business that has been the main vehicle for job creation in the United States. The U.S. Small Business Administration estimates that of all new jobs created between 1976 and 1986, 43.7 percent were created by firms with fewer than 100 employees and 26.2 percent were created by firms with fewer than 20 employees. Today, two out of every three jobs are created by small and medium sized businesses. Increased regulation puts those businesses at a considerable disadvantage compared with larger firms who are better able to absorb the high costs associated with paperwork, attorneys fees and staff time needed to navigate increasingly more complicated rules and regulations.

Small businesses are not the only ones to feel the regulatory heat. State and local government officials are also affected by federal mandates. By placing additional mandates on state and local governments, we force them to spend more money each year to comply with regulatory requirements. Of course, in these times of budget constraints, many of these regulations stretch the resources of local and state governments very thin and reduce their flexibility to introduce their own initiatives, a number of which would be an improvement over the current federal mandate. According to a 1993 study issued by the U.S. Conference of Mayors, the estimated cost of unfunded federal mandates to cities for that year alone was over 6 billion dollars. Although I was very pleased with the unfunded mandates legislation enacted in this Congress, I believe that we must now pass legislation providing the same types of benefits to our private industry.

Our military also feels the effects of increased regulation. A prime example of this can be found at Fort Bliss in Texas. Included in the fiscal year 1996 Defense Appropriations Act was language requiring Fort Bliss to prepare an environmental impact study as a prerequisite for the renewal of the lease on approximately 608 thousand acres known as the McGregor Range. This study will cost the Army more than 10 million dollars over the next three fiscal years, with over 30 percent of that total expended in order to comply with the Department of the Interior/Bureau of Land Management regulations for land renewals. In addition, for fiscal year 1997 Fort Bliss will be required to program over 13.3 million dollars for environmental and other compliance costs. Cutbacks in our military are causing some of the men and women of our armed forces to live in sub-standard housing and rely on food stamps simply to maintain an existence. I believe that through proper regulatory reform and a review of rules and regulations, facilities like Fort Bliss would be able to use some of that 13.3 million dollars every year to ensure a decent standard of living for those who fight to protect us.

Often, Congress' well intentioned actions evolve into entities which take on a life of their own. For example, worker safety was the primary reason for establishing the Occupational Safety and Health Administration (OSHA) in 1970. In the twenty-six years since its creation, OSHA has far exceeded its original mandate by producing in excess of 4000 rules and regulations dictating almost every aspect regarding the workplace, with many bordering on the ridiculous. For example, in 1994, a brick factory in Redding, Pennsylvania was required to include a form with shipments of their bricks, describing for workers how to identify a brick (a "granular solid," and "essentially odorless," in a "wide range of colors") and giving its specific gravity (approximately 2.6). Can any of us truly say that it was our intent for a company to be required to do this? Today, it appears as though OSHA is more concerned with making sure its forms are kept correctly than with actually protecting the safety of America's workers. A book written by Philip K. Howard entitled *The Death of Common Sense* states that in 1994 OSHA issued 19,233 citations for not keeping its forms correctly. One regulatory expert estimates that filling out OSHA forms takes Americans 54 million hours per year.

Sadly, one of the greatest workplace tragedies in the history of my state, more than likely could have been prevented had it not been for a United States Department of Agriculture poultry inspector. On September 3, 1991, a grease fire broke out in an Imperial poultry plant in Hamlet, North Carolina, and quickly spread throughout the building. Employees trying to get out of the building discovered only locked doors. Twenty-five Imperial employees could not escape and were killed in the fire. However, what was not reported was that in June of 1990 a U.S.D.A. poultry inspector ordered those doors to be closed due to the fact that he noticed several flies entering the plant through the open doors. The response by the Imperial company was included in his report and stated that the company promised that the outside doors "will be kept locked." The inspector verified that corrective action had taken place and signed off on the report. Imperial foods should not be held unaccountable for this tragedy, but government regulation was also partially responsible.

These examples make exceedingly clear the need for Congressional oversight in the regulatory process. Unfortunately, for us to take action under our current procedures is too cumbersome and complicated. I discovered this firsthand in October of 1993 when I decided to challenge the Equal Employment Opportunity Commission's (EEOC) proposal of a new set of guidelines relating to harassment in the workplace. The guidelines in question covered not only religious harassment, but also harassment based on race, color, gender, national origin, age or disability. However, the scope of the prohibited religious harassment was so broad and rested on such subjective factors that constitutionally protected religious expression, such as keeping a bible in your desk or the wearing of a cross on a necklace, could easily be declared illicit harassment and punished.

In order to correct this excessive interpretation, I offered an amendment with Representative Frank Wolf (R-VA), to the FY 95 Commerce-Justice-State-Judiciary appropriations bill that stated that the EEOC could not implement, administer or enforce the guidelines covering harassment based on religion. After unsuccessful attempts in both subcommittee and full committee, I was forced to request a waiver from the Rules Committee to bring this issue to the floor. Due to intense national grassroots lobbying, the Rules Committee granted my waiver and the Taylor-Wolf amendment passed on the House floor by a vote of 366-7. The overwhelming support for the amendment shows Congress' desire to review proposed rules and regulations prior to enactment. Had H.R. 47 or similar legislation been in place, Congress would have had a streamlined process for reviewing this regulation. Without a law in place, Congress has no guarantee that it can express its concern with rules or

regulations because of existing House rules such as that which prohibits legislating on an appropriations bills.

No matter how one defines "over regulation," there is a point at which the government risks provoking citizens' resentment and disobedience by imposing upon them regulations perceived to be irrational, authoritarian, and prohibitively expensive. Congress has given federal agencies too much discretion in interpreting laws to create regulations. Many will argue that Congress is taking on more than it can chew by reviewing all proposed rules and regulations. I would argue that Congress could do no more important job. Congressional regulatory oversight would take considerably less time than the years that are currently invested in judicial review of agency regulations. It is the job of every Member sitting in this room today to restore common sense, fairness and responsibility to government, and I believe that Congressional review of rules and regulations is an excellent place to begin.

Mr. GEKAS. We invite the gentleman from Oklahoma, Mr. Brewster, to join our colleagues at the table, at the witness table, and invite him to proceed with his statement.

You're at an advantage; you haven't heard a word that your colleagues have said. So you're at a great advantage. [Laughter.]

Mr. TAYLOR of North Carolina. Try not to repeat anything we've said. [Laughter.]

STATEMENT OF HON. BILL K. BREWSTER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OKLAHOMA

Mr. BREWSTER. Mr. Chairman, I suspect you've already heard about as many words as you want to hear this morning, so I'm going to keep my statement brief and try to give you back a couple of minutes.

But, anyway, thank you, Mr. Chairman, for the opportunity to be here this morning. I would like to address this committee today not as a Congressman, but as a rancher and a businessman. I speak as someone who has made a payroll, who has created jobs, and been forced to sort through the complex maze of confusing Federal regulations. The frustration of dealing with regulatory burdens is certainly not unique to me, but it's felt by millions of Americans every day.

I did not come before this committee to bash Federal employees, nor to demean their efforts. Yet, I fear that many of the Federal employees, having spent most of their lives in public service, do not fully understand the worries of small businessmen. They may not fully comprehend the struggles of farmers and Main Street merchants as they try to make ends meet and make their payrolls.

The greatest problem with the current system is there is a lack of accountability. The bureaucrats, who may not understand the problems of small businessmen, are never forced to stand before the public in an election. On the other side of the coin, the Congressman can go home and tell his local chamber of commerce, "I oppose such regulation, but I never had the opportunity to vote on it." Then he can go on to score some points by railing against the actions of nameless, faceless bureaucrats. In the end, no one is held accountable for the rules and regulations.

In short, when Congress delegates away its authority, it isolates the Government from the governed. It alienates those who are forced to live by laws which they did not have a say in making. Worst of all, it can contribute to the further erosion of the people's trust in their Government.

While I am currently a cosponsor of Congressman Hayworth's bill, I am also intrigued by the proposals put forth by Congressman Taylor and Congressman Smith. I firmly believe that the Congress needs a mechanism to review significant rules and regulations before they take effect and on a constant basis after they take effect as well.

Again, thank you for allowing me the time to speak. I deeply regret that I will not be here in the next Congress when this issue, as well as many others, are taken up that will certainly involve the business community, but I look forward to working on these issues once again as a private citizen. Thank you.

[The prepared statement of Mr. Brewster follows:]

PREPARED STATEMENT OF HON. BILL K. BREWSTER, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF OKLAHOMA

Thank you Mr. Chairman, I would like to address this committee today, not as a Congressman, but rather as a rancher and a businessman who has met a payroll, created jobs, and been forced to sort through a complex maze of confusing federal regulations. The frustration of dealing with regulatory burdens is certainly not unique to me, but is felt by millions of Americans.

I did not come before this committee to bash the federal employee, nor to demean their efforts. Yet I fear that many of these bureaucrats, having spent most of their lives in public service, do not fully understand the worries of small businessmen struggling to make ends meet.

The problem with the current system is that there is a lack of accountability. The bureaucrats, who may not understand the problems of small businessmen, are never forced to stand before the public in an election. The Congressman can go home and tell his local chamber of commerce, "I oppose such regulation, but I never had the opportunity to vote on it." Then, he can go on to score some points by railing against the actions of "nameless, faceless bureaucrats."

In short, when Congress delegates away its authority, it isolates the government from the governed. It alienates those who are forced to live by laws which they did not have a say in making. Worst of all, it can contribute to a further erosion of the people's trust in their government.

While I am currently a Co-Sponsor of Congressman Hayworth's bill, I am also intrigued by the proposals put forth by Congressmen Taylor and Smith. I firmly believe that the Congress needs a mechanism to review significant rules and regulations before they take effect.

Again, thank you for allowing me this time to speak. I deeply regret that I will not be here when this issue is more thoroughly addressed in the next Congress, but I look forward to working on these issues once again as a private citizen.

Mr. GEKAS. We thank the gentleman, and we will contact you back on the ranch—

Mr. BREWSTER. Thank you.

Mr. GEKAS [continuing]. When necessary to get some elucidation on this issue.

Mr. BREWSTER. Having been in the arena, I know to write the people up here. [Laughter.]

Mr. GEKAS. I have just a couple of questions. We recognize the presence of the gentleman from Ohio, Mr. Chabot.

In both the Hayworth and the Smith proposals, there is a set procedure, even to the point of setting the time for debate on the proposals that would come before the House. It seems to me that these bills will have to be incorporated into the Rules of the House as we proceed into the next session. I would have to recommend to these gentlemen, if we happen not to have time between now and sine die to deal with this issue, and that's probably the case, as you know, we ought to be thinking about, those of us who are concert here, about very early in the next session trying to incor-

porate your proposals at least—and they are consonant with the others—before the Rules Committee even promulgates its first set of rules for the House. If we can put these into the rules of the House, we've gone a long way in accomplishing your purpose. Do you get a sense that that might be accomplishable?

Mr. SMITH of Michigan. Mr. Chairman, it seems very reasonable that we should pursue that, and if we could get it in the rules that in the event that Congress decided to take over this responsibility, these kind of fast-track procedures would be allowed it would be a tremendous step forward, and we should consider working with the Rules Committee.

Mr. GEKAS. Yes, I would like to—

Mr. SMITH of Michigan. I think it's an excellent suggestion.

Mr. GEKAS [continuing]. And I'd like to work with you on that. Now that's presupposing that we all return, and we'll consult with our respective opponents, in that regard. [Laughter.]

If we can bind them to the same proposal, then whoever wins can help us.

Mr. HAYWORTH. Mr. Chairman, I do appreciate your suggestion, and keeping in mind the vicissitudes of the electorate—

Mr. GEKAS. Yes.

Mr. HAYWORTH [continuing]. If we're able to come back—and who knows who may finally be part of that Rules Committee next time, but I think we should work with the chairman and others. I think that's a reasonable first step in that regard.

Mr. GEKAS. I have no further questions of the panel. I appreciate their testimony.

Mr. Reed.

Mr. REED. Mr. Chairman, I just want to thank my colleagues for their testimony, and they've proposed several interesting solutions to a problem that affects all of us, because, as Mr. Taylor and others have indicated, there are times when the regulation has become so, shall we say, disconnected from the legislation that we have to take ad hoc action through the appropriations process. So I believe it's useful to think through these issues, and these proposals are starting points to do that.

I would just make one comment, though, that I think it's appropriate to add that there is a consistent and large-scale review process that goes on every day through the courts. One of the provisions of scope of review is whether the regulation as proposed is consistent with the legislation. So we're not doing this in a vacuum, where once a regulation is proposed, it cannot be challenged by anyone. In fact, on a daily basis, particularly in the District of Columbia, regulations are being challenged constantly. So I think that should be noted as we proceed forward.

Mr. SMITH of Michigan. May I just give a short response?

Mr. REED. Certainly. Certainly, Mr. Smith.

Mr. SMITH of Michigan. What we have found in the States—and maybe you have observed the same situation, and it happens federally, too, is that the courts have started becoming almost law-makers with their interpretation of the law. As a result, many States have gone into more and more detail in the law in order to try to preempt the court in having the final decision on the intent of the law. If there could be legislative overview, then we wouldn't

have to become quite so precise in the law when it was passed initially.

Mr. REED. If I may just respond to Mr. Smith, though, I don't think there's anything within your proposals that would preempt the review of regulations, either approved by us, so that in a sense what we're adding is another level of review of regulations. This is one of the concerns of some of the people who are not as enthusiastic about your proposals—in effect, what we're doing is either delaying the process by interposing the Congress or creating a situation where, even after we've acted by legislating and then approving the regulations, there will still be a court challenge which could negate what we want and send the regulations back to the starting gate. So I don't think there's an easy answer.

Mr. TAYLOR of North Carolina. Mr. Chairman, the other point I might make is that we are in each case asking that these be reviewed before they're released upon the public. And, in reality, if I'm a small business person and I've been cited for something, I have two problems: one, the cost of getting up through the legal system to have my case heard and the time to get away from my business and all the things to follow my judicial remedy, which, as Mr. Reed pointed out, is there.

The second factor is the factor of fear. I've had many business people talk to me about the OSHA situation. An inspector will say, "I've got to find some things wrong today. You run a good operation, but I'm going to fine you; I'm going to cite you for something." And, of course, what happens then, there's the unstated comment that, sure, you can fight this, and next time maybe I'll find two things that are wrong, and it is nebulous. It is very subjective, and it puts the small business person in a bad way. We could comb out perhaps some of the ridiculousness before it ever is released upon the public, and the cost released upon the public.

Mr. BREWSTER. If I could make one comment on that as well—having served in the State legislature for 8 years in Oklahoma, we had oversight in this manner before any regulation went into effect. Obviously, we have to have regulations. That's the way a democracy and a government works. The Government has to have some regulations on different aspects of life. At the same time, during that 8 years in the legislature there were probably 10 or 12, maybe 14, instances—about a little over one a year—where there would be some regulation that was passed by an agency that there would be such an outcry from the public that the legislature would review it and would send it back.

I think that review is proper, and people in rural Oklahoma probably aren't as sophisticated as they are in Rhode Island. We haven't been a State a hundred years yet. And our people—

Mr. GEKAS. I vote for Oklahoma. [Laughter.]

Mr. BREWSTER. I guess our people haven't mastered the court process and probably don't have the resources to challenge regulations to the extent that they might in other areas, though from our standpoint it's worked well for our legislature to have oversight, and any time regulations were changed you had a time frame when the legislature could preclude those regulations, and could send it back.

Mr. REED. Well, reclaiming my time, I served in a State government also——

Mr. BREWSTER. Yes.

Mr. REED [continuing]. And I understand that both at the Federal level and the State level that regulations are promulgated which we would not recognize as the authors of the actual legislation.

Mr. BREWSTER. Yes.

Mr. REED. What I think we have to do as we go forward is try to develop a mechanism which might identify potentially those types of regulations and not sweep every bit of regulation from setting time zones to establishing hunting seasons, doing all these things which are routine, and if we have to act, will simply delay the process and not simplify the process.

The other factor, though, too, is, again, understanding all these proposals, none of these proposals would directly preempt review by a frustrated citizen once they've been vetted by us and made public, nor would they get at the problem that Mr. Taylor has suggested, the enforcement problem. Just whatever regulation, is it being enforced well or is it being enforced in an unfair way?

But, again, I concur with the chairman that this is a worthwhile endeavor to look at, and I suspect next Congress it will be considered. And I thank you, gentlemen.

Mr. GEKAS. In that regard, the mention that was made by the gentleman from North Carolina about having our business entities fairly warned about what is coming down the line by way of regulations is the text of a bill that is on the floor technically right now, our fair warning regulation bill, on which the gentleman from Oklahoma became a cosponsor as recently as yesterday. I commend that to your attention because we still have a chance, a long shot but still a chance, to get it considered in the full House very shortly. What's the number of that bill? H.R. 3307—so you might take note of that and you might want to add your personal impetus to that because it's right along this line.

We note now the presence of the gentleman from South Carolina, Mr. Inglis, and we recognize the gentleman from Ohio, Mr. Chabot, if he should want to interrogate our colleagues.

Mr. CHABOT. Thank you, Mr. Chairman. I'll be very brief. I want to thank you for holding this hearing. I think this was very valuable. I truly think that the current system which basically allows unelected bureaucrats to, in essence, make so many of our laws really does result in a lack of accountability. As Congressman Brewster, who I have a tremendous amount of respect for and I think we're really at a loss that you're leaving here, despite the fact that we're of opposite parties, said about the current situation allows the governed to be separated from their Government. I think this is a real problem, and then I think it creates a lot of cynicism among the public.

So, I look forward to the passage of this legislation in whatever form it finally takes, and I want to commend all four of my colleagues here for their work in this area. I think this is very, very valuable legislation, once we work out the bugs and decide what form it should actually be. I think this is certainly heading in the

right direction. I want to commend all of you for your work, and I'll yield back the balance of my time, Mr. Chairman.

Mr. GEKAS. I thank the gentleman and yield to the gentleman from South Carolina.

Mr. INGLIS. Mr. Chairman, I would concur with my colleague, Mr. Chabot, in congratulating these folks on their good work on these bills and look forward to the other panels. Thank you, Mr. Chairman.

Mr. GEKAS. Thank you very much. With the thanks of the subcommittee and the personal gratitude of its chairman, we dismiss our colleagues.

We now invite the second panel to take their places at the witness table: Prof. David Schoenbrod, who teaches at the New York Law School. Professor Schoenbrod is one of the founders of the Natural Resources Defense Council and has long been interested and active in the question of congressional delegation.

Joining him will be Prof. Ernest Gellhorn from the George Mason University School of Law. He has written extensively on administrative law.

Gregory S. Wetstone is the legislative director of the Natural Resources Defense Council, who, judging from his prepared statement, will raise questions of the feasibility of the kind of exercise by Congress as contemplated in some of the legislative proposals before us.

Jerry Taylor is the director of natural resources studies for the Cato Institute, a public interest organization headquartered here in Washington.

And, finally, Prof. Marci A. Hamilton is a professor of the Benjamin Cardozo School of Law at Yeshiva University. Professor Hamilton clerked for Justice Sandra Day O'Connor. She was a magna cum laude graduate of the University of Pennsylvania Law School, where she was editor of the Law Review. She holds masters degrees both in philosophy and English from Penn State and was a summa cum laude graduate of Vanderbilt University.

But, with that, we'll begin in the order that we announced the presence of the witnesses. As stated earlier, all written statements will be accepted for the record in advance, and each witness will have a 5-minute deadline. Some of the time, then, that you will have lost could be made up during the question and answer portion of the session.

So we'll begin with Professor Schoenbrod, who has 5 large minutes to expound.

STATEMENT OF DAVID SCHOENBROD, PROFESSOR, NEW YORK LAW SCHOOL, AND ADJUNCT SCHOLAR, CATO INSTITUTE

Mr. SCHOENBROD. Thank you, Mr. Chairman, for the opportunity to testify. I think I'm a bit of a strange bird on this issue. Here I am proposing that we end delegation of legislative power; yet, I'm one of the founders of the Natural Resources Defense Council, as you mentioned. Why this seeming disparity? The answer is I was mugged by reality.

I want to tell you a story about one of those muggings by reality, and it has to do with time back in the 1970's when I was the leader of the environmental campaign to get lead out of gasoline, a matter

which President Clinton alluded to with some pride in his most recent State of the Union address.

In 1970, when Congress was debating the Clean Air Act, one of the most insistent public demands was to reduce lead additives to gasoline. Of course, the chemical and the petroleum companies resisted, but with the benefit of hindsight, it's clear to me, as the person who represented the environmental interests in that dispute, that it would have been best if Congress had itself decided back then whether to enact a law to reduce the lead content of gasoline. I have no illusions that the resulting law would have been highly rationalized or scientific; rather, it would have been a political response to political facts. Those political facts were that lead in gasoline was a big issue. "Get the lead out" bumper stickers were everywhere. The lead users, the lead refiners, the gasoline refiners, could have lived with a substantial reduction in lead content of gasoline because there are diminishing economic returns to using lead in gasoline. Given the political pressure on Congress, I think Congress would have passed a statute that would have substantially reduced the lead content of gasoline early in the 1970's. Instead of that, this important public health threat lingered over us for practically another decade, and the reason why it did is because of delegation.

Congress enacted the 1970 Clean Air Act, which delegated to EPA wholesale, yet with exacting specifications about how EPA should exercise this lawmaking authority. Despite all the verbiage in the act, however, Congress delegated to EPA all of the hard choices, including the hard choices as to lead in gasoline. Nonetheless, of course, Members of Congress and the President claimed that they had made the hard choices and that the public would be protected from all harmful pollutants within the next several years.

As to lead, EPA promptly moved to require that lead-free gasoline be used in the new cars with the emission control devices, but that was to protect the emission control devices, not to protect the children. It so happened that there was—

Mr. GEKAS. Not to what?

Mr. SCHOENBROD. Not to protect the children. You see, there were tens of millions of cars still on the road that didn't have the emission control devices; as to them, leaded gasoline could still be used. And as the refiners started to make lead-free gasoline for the new cars, they were putting more lead in the gasoline for the old cars.

Now EPA realized that there was this tremendous health threat to children, but Members of Congress, including many liberal Democrats, pressured EPA not to move because of industry opposition to regulation. At this point, in 1972, I filed a series of lawsuits in various courts to require EPA to use its delegated authority. I won those lawsuits, and the courts ordered the EPA to exercise that delegated authority.

At this juncture, the public was supposed to get the payoff of delegation, which is that the experts would be free to decide the technical issues needed to protect the public interest. But it turned out, of course, that the technical issues are not that clear, and, in fact, there's a lot of technical disputes. And so what EPA did on the record was to engage in a lot of guesstimates, but the guesstimates

were really a political response to the pressure that EPA was feeling from Congress, from both proponents of regulation and opponents of regulation, and the White House.

So far, my story suggests that the main rationale for delegation, which is to let the experts decide the technical issues, is utter hogwash. In this town all knowledge is politicized, and, besides, seldom do the technical considerations settle the dispute. Often, the key issues are questions of value. How much do we value health versus how much do we value minimizing the cost of controlling pollution? And, besides that, with the advice of experts, Congress often decides technical issues. Having experts decide technical issues is simply not a defensible rationale for delegation.

Now the other rationale for delegation is that the agencies can handle these issues with dispatch. But, as Congressman Hayworth pointed out, the issue of lead in gasoline was never fully resolved by Congress or by EPA before the refiners decided, 15 years later, that they didn't want to make lead in gasoline anymore because so many years had gone by that the cars still using the leaded gasoline had largely disappeared from the road. So it wasn't that the agency resolved the lead-in-gasoline issue; it was that the issue became moot before the agency solved it.

Mr. GEKAS. We'll return to you during the question and answer portion.

Mr. SCHOENBROD. OK.

[The prepared statement of Mr. Schoenbrod follows:]

PREPARED STATEMENT OF DAVID SCHOENBROD, PROFESSOR, NEW YORK LAW SCHOOL,
AND ADJUNCT SCHOLAR, CATO INSTITUTE

My name is David Schoenbrod. I am here to testify that Congress and the president should end the practice of delegating to executive agencies the power to make the laws.

Although I believe that such delegation violates the Constitution, the genesis of my recommendation is practical experience in the ways of Washington. My first job here was working for Senator Hubert Humphrey on the staff of the Senate Committee on Small Business in the summer of 1962. I worked for him again in 1963 and 1965, when he was Vice President. Subsequently, I clerked for a judge on the U.S. Court of Appeals for the District of Columbia Circuit, where much of the caseload is reviewing agency rule making. Then, I was one of the attorneys who founded the Natural Resources Defense Council. Through most of the 1970's, I handled a caseload that today would be described as in the field of "environmental justice." Overall, this experience has given me a clear view of what really happens when Congress and the president turn over their joint lawmaking power to agencies. My understanding of how delegation really works led me to question whether it really is in the public interest. To come to grips with that question, I left NRDC and became a law professor. Much of my scholarship has focused on that question, with the chief example being my book: *Power Without Responsibility: How Congress Abuses the People Through Delegation* (Yale U. Press, 1993(1-800-YALE UPS)).

Let me start by telling you about one campaign that I lead for the environmental side while at NRDC, the campaign to control airborne lead pollution, chiefly from lead additives to gasoline. Today, official Washington congratulates itself on how it handled the airborne lead problem. In his 1996 State of the Union message, President Clinton applauded that "lead levels in children's blood have been cut by 70 percent" through a "generation of bipartisan effort." I have a different story to tell in which delegation by Congress and the president delayed meaningful response to an important health hazard.

In 1970, when Congress was debating the Clean Air Act, one of the most insistent public demands was to reduce lead additives to gasoline. Of course, the chemical companies that made lead additives and the petroleum refiners that put them in gasoline opposed any such move. With the benefit of hindsight, it would have been best if Congress received reports from the experts in the federal agencies, taken testimony, and then decided whether to enact a law itself to reduce the lead content

of gasoline. I have no illusions that the result would have been highly rationalized or scientific. Rather, it would have been a political response to political facts and the political facts were these. Congress and the president felt under great pressure to show progress on air pollution. Lead in gasoline was a major symbol of the problem. Bumper stickers reading "Get the Lead Out" were prevalent. Refiners would not have felt great pain in substantially reducing, but not eliminating, lead in gasoline because adding more lead per gallon produces diminishing economic benefits. Without delegation, the upshot would, I think, have been a law that substantially reduced the content of gasoline in the early 1970's.

What Congress and the president did, of course, was to enact the Clean Air Act of 1970, which delegates their lawmaking powers to EPA wholesale, yet with exacting specifications about how it should make the law. Despite all the verbiage in the act, the hard choices about lead in gasoline and just about every thing else were left to EPA. Nonetheless, members of Congress and the president told their constituents that they had made the "hard choices" such that every harmful pollutant would be brought down to safe levels within the next several years.

As to lead, EPA promptly moved to require that lead free gasoline be used in the new cars with the emission control devices, but that was to protect the emission control devices from lead, not to protect children from lead. The children were not being protected because there were tens of millions of old cars on the road that still used leaded gasoline, and the refiners were making up for the ban on lead in the gasoline for the new cars by putting more lead in the leaded gasoline for the old cars. EPA realized that the health risk continued and initially proposed to reduce the lead content of gasoline. But, the chemical and refining industries mobilized members of Congress, including some liberal Democrats, to pressure EPA not to act and the regulation of airborne lead to protect health was put on hold.

At this point, in 1972, I began to file a series of law suits to force EPA to regulate lead in gasoline and to establish a national ambient air quality standard for lead. I won the law suits and the courts ordered EPA to exercise the authority delegated to it. At this point, the public was supposed to get the pay off from delegation: a technical issue would be resolved by the experts looking at the data. The problem was that studies did not provide clear answers, but rather showed the health consequences of lead in the air depended upon a series of questions as to which scientists clashed. On the record, EPA dealt with this uncertainty through a series of guesstimates. In reality, the guesstimates were shaped to allow the agency to come up with a result responsive to the political pressures applied to the agency by members of Congress and White House acting at the behest of constituents and contributors.

So far, my story shows that the main rationale for delegation—let the experts decide the technical issues—is hogwash. There are seldom clear technical answers. In this town, all knowledge is politicized. In any event, the questions at bottom are not technical ones but rather questions of values—for example, the balance to be struck between health and economic considerations. Moreover, the people making the final decisions at the agencies tend to be lawyers, just like many members of Congress. With the advice of experts, Congress does vote on technical issues when it is politically convenient.

The other great rationale for delegation is supposed to be that agencies are able to resolve controversial issues with dispatch. As I have already indicated, it took years of litigation to force EPA to pick up this hot potato. It took years more of administrative proceedings, and more trips to court, to get EPA to conclude its rule-making proceedings. These, in turn, were subject to time consuming judicial review. And, when that was over, EPA under both Democratic as well as Republican administrations initiated additional rulemaking proceedings to postpone implementation of the lead in gasoline regulations. The agency proposed rulemakings weakening or strengthening the regulations once in 1976, twice in 1979, once in 1980, four times in 1982, three times in 1983, once in 1984, four times in 1985, and once in 1986. Before EPA ever resolved the lead in gasoline dispute, most of the old cars that had still could use leaded gasoline in the early 1970s had gone to the scrap heap so that petroleum refiners no longer cared to bother marketing leaded gasoline. As a result, EPA under President Reagan issued a regulation eliminating lead from gasoline in 1986. In sum, over a decade in a half, the lead in gasoline issue became moot before EPA ever resolved it.

In sum, the theory that delegation is a way to resolve issues with dispatch simply does not square with reality. Agencies cannot resolve controversial issues with dispatch because all the political pressures that Congress would have to wrestle with in resolving an issue are also felt by the agency and, in addition, Congress imposes upon the agencies extremely time consuming procedural requirements and then fails to give them sufficient funding to do fulfill these requirements.

The delay occasioned by delegation meant that the major decreases in the lead content of gasoline did not take place until the late 1970s and early 1980's. As a result, the tens of millions of children who went through early childhood after the early 1970's were unnecessarily exposed to harmful levels of lead in gasoline. Now that lead is out of gasoline, we know that it increased fourfold the lead burden carried by the average young children, with measurable adverse health consequences.

Having used the story of lead to suggest why delegation is unnecessary, let me explain why it undercuts democracy. The Constitution was designed to allow voters to hold the lawmakers they elect accountable for the laws by requiring that they be enacted by majorities in both houses and signed by the president (subject of course to the provision for overriding presidential vetoes). This way, lawmakers are supposed to take individual responsibility for controversial laws through their publicly recorded votes. Delegation allows our elected lawmakers to pass responsibility for the laws along to unelected bureaucrats. But, in delegating, members of Congress and the president do not give up their power over the laws, just their responsibility. They retain their ability to influence the laws by pressuring agencies in the course of doing casework. Such casework often results in campaign contributions and electoral endorsements. Casework, unlike votes on statutes, is not recorded in the Congressional Record and members can do casework on both sides of a controversy.

Defenders of delegation say that it is nonetheless consistent with democracy because Congress and the president can enact a statute to reverse a law made by an agency. But, usually, no such bill ever reaches the floor. As a result, laws are sustained through the collective inaction of Congress and the president. The upshot is that the elected lawmakers bear no individual responsibility for the laws.

Earlier in this session, Congress enacted as part of the Small Business Regulatory Enforcement Fairness Act of 1996 a procedure that would make it easier to bring to the floor a bill to revoke a law promulgated by an agency. While the new procedure is a step in the right direction, the proper destination is compliance with the Constitution. While the Constitution requires the House, the Senate, and the president to enact a new law, the new procedure requires the House, the Senate, and the president to revoke a new law. The Constitution requires joint action to make a law to ensure that law are made only if there is broad political support, but the new procedure means that agency laws can be revoked only if there is broad political support. In comparison to the Constitution, the new procedures tilts towards more regulation.

Moreover, under the new procedures, ways will be found to avoid voting on many controversial rules. If all the controversial rules are to be voted on anyway, why not follow the lawmaking procedure ordained in the Constitution?

There is a final, and to me, overpowering reason to think that Congress and the president should require that laws be made only through the means ordained in the Constitution. To explain why, I return to the Clean Air Act. Air pollution laws must necessarily balance health and economic considerations. If Congress and the president themselves make the laws, they inevitably must strike that balance. But, if they delegate, they can promise, as they did in the 1970 Clean Air Act, that the agency will make laws that protect health and protect the economy—that we will have guns and butter, that we will have our cake and eat it too. With Congress and the president having legitimated conflicting political expectations, whatever the agency does will stir disappointment in some constituency, which members of Congress and the White House will relay to the agency. The result is delay, complexity, and confusion—delay in protecting health, complexity in the form of endless agency proceedings for which taxpayers, shareholders, and consumers end up footing the bill, and confusion in the sense that industry does not know what its responsibilities will be. And because being able to promise guns and butter is so politically irresistible, Congress is induced, with the best of intentions, to enact more and more regulatory schemes. In this sense, delegation is a kind of political addiction. The new procedures do not kick the addiction, but rather offer a way to say "I'm sorry" for just a few of consequences. There is an obvious solution. Just say "no" to delegation.

Mr. GEKAS. The time of the gentleman has expired.
Professor Gellhorn.

STATEMENT OF ERNEST GELLHORN, A PROFESSOR OF LAW, GEORGE MASON UNIVERSITY

Mr. GELLHORN. Thank you very much, Mr. Chairman. Having been asked to appear very recently before this committee, I have

an outline I drafted this morning that is available; I don't have a formal statement.

The issue raised by the legislation proposed before this committee is a very important one, and that is the accountability for laws and requiring lawmaking pursuant to the constitutional design. The question posed, however, by the legislation is quite different. It is: should the burden of adoption of regulations be one that should be adopted by Congress—Congress would be the only body to approve a regulation—or should it be, under the current Contract With America Advancement Act, one that Congress can overturn pursuant to the procedure that that act, adopted earlier this year?

It seems to me that one can provide very quickly some strong reasons to support this process. It first asks the serious question: have we structured government correctly? It's not mandated in the Constitution that the executive branch ought to write the rules in the way they have. So that I like the question posed by this legislation.

Second, if applied thoughtfully and carefully, if Congress had the time and the resources to do it, the proposals make a lot of sense. All of the arguments proposed by the Members of the Congress who were here earlier this morning it seems to me are powerful.

We could avoid, for example, such accidents as the 1974 seatbelt interlock, which Congress reversed after NHTSA adopted it, but didn't have a chance to look at it in advance. And it seems to me, since these bills would make it more difficult to adopt rules, we'd reduce some overregulation. So I see some basic good ideas in this regulation—or this proposal.

The question, it seems to me, is: are there reasons to oppose it, question it, or to say maybe we ought to be a little more cautious? I'm not of the Mae West school that, as between two evils, I always try the one I haven't tried before. It seems to me that that's not a good way to write legislation.

It seems to me that all of the bills presented to you are too broad and would, in fact, probably stop all rules without consequence as to whether they make sense or not. DOT, for example, issues hundreds of rules that would be covered by this that Congress supposedly would have to look at, including, for example, speedboat races. You couldn't have a speedboat race unless Congress approved, pursuant to the current legislation because DOT regulates navigable waters.

Look at the current questions posed by the States on implementing welfare reform. They are asking the administration: give us some guidance; give us the rules. The administration has not been able to respond. I don't think Congress could aid that process. So at least an escape mechanism would be necessary; some method ought to be imposed as to which rules you look at.

The second thing, it seems to me, is that I don't think Congress as currently structured can really do it, and I don't know whether it needs to be restructured. If you look at the current FDA rule-making, its issued rule on cigarette regulation, the rule itself is dozens of pages, but in support of it, it has written a 695-page concise statement of basis and purpose, plus another 662-page statement of jurisdiction, and a record of over a million pages. That's

not a job for Congress to focus on and evaluate to that degree. It ought to decide, however, which it has not, directly whether or not the FDA has this authority.

In other words, what I'm suggesting is that these bills ultimately are, insofar as they're focused on regulation not accountable to the people, looking at the wrong problem. The problem is that Congress has authorized too much regulation—sugar quotas, food recipe standards, CAFE fuel economy, FAA regulation of airline gates, excessive regulation of tariffs, the IRS code. That's where Congress ought to put its time and energy. We do not have a good experience with congressional micromanagement of regulation.

For example, between 1970 and 1975, the Congress passed 89 bills or laws with 163 one-House veto provisions and I don't think the period between 1970 and 1975—or, indeed, until 1983——

Mr. GEKAS. One thousand one what?

Mr. GELLHORN. It passed—Congress, between 1970 and 1975, adopted 89 laws which had 163 one-House veto provisions.

Mr. GEKAS. Oh, I see.

Mr. GELLHORN. And, yet, despite the fact that we had hundreds of one-House veto provisions that Congress could readily stop a regulation, I don't think the period between 1970 and 1983, when the Supreme Court ruled that provision unconstitutional, is exactly an issue or a time of legislative nirvana when Congress controlled regulations.

Indeed, there are a lot of unexpected consequences here that it seems to me are not possible for Congress to take into account. The problem of acid rain is a problem primarily of Congress mandating taller smokestacks. Once they encouraged the taller smokestacks, we ended up getting more acid rain.

My final point that I would suggest is that you experiment with the idea, if you are to adopt it. Try it with one agency; identify major rules only. Be very careful in how to do it, rather than a broad-brush amendment of the APA.

Thank you.

[The prepared statement of Mr. Gellhorn follows:]

PREPARED STATEMENT OF ERNEST GELLHORN, PROFESSOR OF LAW, GEORGE MASON UNIVERSITY

1. Accountability for laws and requiring law-making pursuant to Constitutional design accepted as a sound premise. Question is whether this bill is a good way, hopefully the best way, to go about it.

2. Strengths and reasons to support:

a. Forces consideration of accountability issues and encourages rethinking current structure of government which relies on agencies to develop most law.

b. If applied thoughtfully and carefully, would result in Congress/President making policy choices with advice and guidance from agency rule making—with added democratic check (e.g., avoid disasters such as 1974 seat belt interlock).

c. Likely to reduce over regulation because regulation much more difficult to obtain.

3. Weaknesses and Reasons to Oppose

a. As drafted, over broad and could be worse than the underlying problem by stopping almost all rules (e.g., DOT speed boat race terms) including those on deregulation.

b. Doubtful that Congress as currently structured could implement (how has it done under newly-enacted Congressional review process?); and if implemented rigorously, would impose substantial burden on Congress—e.g., FDA cigarette rule/statement 695 pages, jurisdiction 662 pp., record over 1 million (700,000 comments).

c. Aimed at wrong problem which is "excessive" regulation due to:

i. Unnecessary Congressionally mandated or authorized regulation—sugar quotas; food recipe standards; CAFE fuel-economy; FAA regulation of airline gates; tariffs (butter); IRS Code.

ii. Failure of Congress to give specific directions to agencies (e.g., Army Corp of Engineers' wetlands regulation) or to require use of less intrusive controls (RCRA prescriptive command/control disposal rules rather than performance standards).

d. No certainty that better results will be achieved by Congressional micro management of rulemaking and some evidence to the contrary:

i. *Pre-Chada* (1983) rules not markedly better (1974 NHTSA seat belt rule) even though between 1970–75, at least 163 one-house veto provisions were included in 89 laws (see *Chada*).

ii. Unexpected consequences—taller smoke stacks mandated by Congress (with EPA's encouragement) to protect communities around power plants resulted in acid rain; public contract sealed bid/public disclosure rules which makes price-fixing by contractors easier and more difficult to detect

iii. Political compromises tend to focus on short-term benefits not long term costs—1979 implementation of Clean Air Act engineered by Byrd/Metzenbaum with rules favoring high sulphur (direct) W. Va/Ohio coal and disadvantaging new, cleaner plants (Ackerman/Hassler, Clean Coal/Dirty Air (1981)) overcome (partly) by 1990 CAA Amendments

iv. FCC and FEC rulemaking subject to close legislative review and participation—not offered as models.

4. Suggestions:

a. Experiment with idea—apply first to one or a couple of agencies where Congressional concern is the strongest; limit to major rules with impact of over \$200 million (equivalent to presidential oversight of Reagan Executive Order 12291); see how it works under a 3 year sunset provision

b. Does not fit in APA whose focus was to institutionalize the notion of administrative agencies providing definition and regularity to the administrative process by (i) developing a uniform structure of formal adjudication; (ii) establishing a framework of "notice and comment" for informal rule making; and (c) codifying basic principles of judicial review of administrative action.

c. Further institutional improvements in APA possible—e.g., recent additions to APA requiring cost-benefit analysis (Unfunded Mandates Reform Act of 1995) and legislative review (Contract with America Act of 1996) are institutional improvements; so might some form of periodic review of agency regulations—but not by adding procedural layers that paralyzes administrative process and prevents deregulation as well as regulation.

d. Focus energy on substantive deregulation and repeal substantive over regulation as permitted or mandated by Congress.

Mr. GEKAS. The time of the witness has expired. With our thanks to him, we move to the next witness, Mr. Wetstone.

STATEMENT OF GREGORY S. WETSTONE, LEGISLATIVE DIRECTOR, NATURAL RESOURCES DEFENSE COUNCIL

Mr. WETSTONE. Thank you, Mr. Chairman, and I want to thank the members of the committee for inviting me here today. As apparently the only witness who's committed to opposing this legislation, I feel a great burden in conveying to the committee the very serious problems that this bill would carry out.

Mr. GEKAS. Well, you won't get any extra time. [Laughter.]

Mr. WETSTONE. I'll keep that in mind and speak rapidly.

I think this legislation as drafted would have some unusually destructive impacts. It would hamstring the Nation's environmental and health protection agencies and make important laws that have worked to protect our health and environment essentially meaningless, rendering the agencies as no more than legislative drafters with proposals that Congress would probably not have time to consider.

To begin with, it's simply not feasible for Congress to review all the rules. The reality is that this Congress the 104th Congress, which is almost over, has enacted 193 bills in 2 years. That's less than one hundred a year. In order to simply review the proposals that are being produced by Federal agencies today, Congress would be required extend their productivity by about fiftyfold to deal with 5,000 annual rulemakings. Now one wonders. If Congress—and this isn't just this Congress, but this is also Congresses past, typically has problems doing 13 appropriations bills simply to fund the government by the end of the fiscal year; one wonders how they're going to get to an additional 5,000. And, indeed, it seems strange to say at this point that Congress is doing so well with its current workload, that it should pick up an additional 5,000 measures to review annually.

I understand that one response will be, well, that's simply too many. There's too much regulatory activity going on. But I think if you look at what's in these rules, you find that many—in fact, most—are important, popular, and broadly supported, and well beyond Congress' expertise to review. Is Congress going to get in and look at FAA airworthiness directives? Are they going to do Federal Food and Drug Administration approvals for new drugs? The start of hunting season is actually a rule issued by the Fish and Wildlife Service. Will this be reviewed by Congress and enacted into law? There are FCC frequency allotments that people in the communications business rely on for their livelihood; they have to close down if those rules aren't issued. Disaster designations by FEMA are rulemakings; they would have to be approved here or it simply wouldn't happen. Meat inspection rules by the Department of Agriculture; Coast Guard lifesaving equipment is approved by Coast Guard rulemakings to be worthy, so that people know they can rely on them in a boating accident. Rules are coming forward now at EPA to, for example, protect Americans from cryptosporidium which contaminates drinking water, a very important problem; to protect the planet's ozone layer; and to protect against toxic air pollution from medical waste incinerators. And then there are all the things that make the environmental laws work, which are also rulemakings—approving State plans under the Clean Air Act or the Clean Water Act. If those plans aren't approved, then the Federal Government, rather than the State, ends up enforcing the law.

Does Congress really want to take on the responsibility and the burden of having to do every one of these rules? And if they miss them, if they don't do them, people pay. Americans would be extremely unhappy about a failure to issue a long list of rules that I'm not even mentioning here. There is that accountability argument, but it simply doesn't work because Congress would not have the opportunity to give any meaningful, intelligent consideration to roughly 5,000 new measures.

I wonder if this is a measure that is promoted by advocates of term limits. When Congress fails to get the airline safety rules promulgated and there's a plane crash Congress would bear responsibility because they didn't get the rule enacted. When people are contaminated from cryptosporidium in their water, as happened to over 100,000 people in Milwaukee; that would be Congress' fault

because Congress failed to issue the rule. Congress would be in an absolutely impossible position under this measure.

The laws that are on the books in my field—and I would urge you to have another hearing with witnesses that are knowledgeable about airline safety or consumer protection or constitutional law, because there may well be issues there that I'm not knowledgeable about. But in the area that I do know about environment, these laws have worked. They're popular. They've improved our quality of life in this country. Air is cleaner in cities across the country. Rivers and lakes have made dramatic improvements under these laws. I'm not aware of any indication of the kind of sweeping problem that would necessitate this sort of approach in the environmental area.

In closing, I would urge the committee to avoid this measure that would essentially close down the Federal Government when it comes to protecting health, safety, and the environment and make things much more difficult for Congress as well, and to consider long and hard before approving measures such as these.

[The prepared statement of Mr. Wetstone follows:]

PREPARED STATEMENT OF GREGORY S. WETSTONE, LEGISLATIVE DIRECTOR, NATURAL RESOURCES DEFENSE COUNCIL

My name is Gregory Wetstone. I am Legislative Director of the Natural Resources Defense Council, a national non-profit environmental advocacy organization.

Mr. Chairman, members of the Subcommittee, thank you for the opportunity to testify here this morning. Unfortunately, my message today must be a negative one.

On behalf of the more than 300,000 members of the Natural Resources Defense Council, and of the millions of Americans who care about protecting our health and environment, I want to register strong opposition to the radical legislative proposals that are the subject of this hearing—H.R. 2727; H.R. 2990, and H.R. 47. I urge the Committee not to favorably report any of these bills, or any other legislation which would have the effect of barring new regulatory safeguards from taking effect in the absence of Congressional approval.

Although there are some difference among the three bills, all would bar any new regulatory action from taking effect until the measure has been considered and approved by Congress, and signed into law by the President. Such a restructuring would hamstring the nation's health and environmental protection agencies, lead to gridlock in the Congress, and render important and popular environmental laws essentially meaningless.

In the balance of this statement, I will briefly review the numerous fundamental problems with this radical restructuring of the federal regulatory apparatus.

On a practical level, it is clearly beyond Congress' ability to screen each and every rulemaking. In a disturbingly common pattern, this Congress, like many that preceded it, appears to be unable to meet the deadline for passage of a number of important measures, including for example several of the fiscal 1997 appropriations bills. One problem is that there is simply not enough time. A more serious obstacle is the difficulty of securing the broad political and Congressional support necessary to move a bill into law, while avoiding spill over from other legislative or political fights, which can often doom even widely supported proposals.

The wrong-headedness of this proposal from a simple logistical standpoint is manifest when one considers that, so far in the 104th Congress, a grand total of only 193 bills have been enacted, less than 100 per year. If Congress were to review and approve each and every rule produced by the federal government, it would be obliged to find a way to increase its productivity by a staggering 50-fold to accommodate the more than 5000 regulatory actions that appeared in the Federal Register last year.

Given Congress' apparent inability to pass in a timely fashion the 13 appropriations measures necessary to simply operate the government, it is difficult to understand how anyone could expect this already over-burdened institution to give intelligent consideration to an additional 5000 measures. Certainly, it seems odd that the sponsors of this legislation have concluded that Congress is performing its cur-

rent obligations so well that it should take up in addition the regulatory responsibilities of the entire federal government.

The measure before the Subcommittee today would oblige the Congress to review a staggeringly broad range of actions, including many in highly technical areas far beyond its expertise, and many that one suspects had never been contemplated by the authors of these proposals. Among the thousands of rules that would be thrown into Congress' gridlock are: the Food and Drug Administration's new drug approvals, the National Fish and Wildlife Service rule establishing the start of the hunting season, the National Oceanic and Atmospheric Administration's fishery management plans and catch quotas (which must be issued in a timely fashion or fisherman will simply lose their livelihood) airworthiness directives and jet route designations by the Federal Aviation Administration, Federal Communication Commission radio and TV station allotment orders, Federal Emergency Management Agency disaster and emergency area designations, Agriculture Department rules governing meat inspections, Agriculture Department rules on the import of animal products (to, for example, avoid African Swine fever infestations), and Coast Guard rules governing lifesaving equipment.

Americans will suffer greatly if Congress fails to approve any of these measures in a timely fashion—not to mention the scores more not listed here.

In the environmental area, there is reason to be concerned about the fate of vital new health protection measures—like the crucial forthcoming rule to protect Americans from cryptosporidium in their drinking water, to limit toxic air pollution from medical waste incinerators, and to phase out chemicals that threaten the earth's stratospheric ozone shield. And there are also rule makings needed to make our environmental laws work. This includes the approval of state air and water quality plans (if they are not approved, the federal Environmental Protection Agency enforces the program instead of the states); the issuance of Toxic Substances Control Act chemical approvals, and the approval of major permits under the Clean Air Act. Does Congress really want to assume direct responsibility for these action?

Then there is the issue of how this process would affect even those rules Congress finds time to evaluate. Congress would be completely at sea in second-guessing the agencies in these highly technical areas. It seems doubtful that the sponsors of this legislation could possibly expect Congress to evaluate the data underlying fishery management plans, to second guess the FAA engineers on airline safety, or to independently examine the toxicological data underlying FDA new drug approvals.

Decisions which were once wholly scientific or technical in nature—under the existing laws and the Administrative Procedure Act—would instead be reached politically. Gone would be even a pretense of making important health and environmental decisions on the basis of independent scientific judgments. In the absence of technical expertise, the political influence of the regulated parties is likely to become the central consideration.

The rules that groups like ours are most concerned with are promulgated under the authority of popular and effective environmental laws that call on agencies to take a variety of important actions for protection of our public health and environment. The impact of the bills under review today would be to render those laws—laws which are the culmination of 25 years of tough bipartisan efforts—largely meaningless. Instead of authorizing agencies to take specified actions to secure vital environmental gains—like protecting the planet's ozone layer, or cleaning up America's lakes and rivers—the nation's environmental laws would be reduced to simply directives for environmental agencies to draft proposed legislation that would never be seriously considered by the over-burdened Congress.

For all practical purposes, this legislation would close down the federal agencies charged with carrying out the laws that protect the public health and the nation's environment.

Nor is it likely that Congress would fare well under the Herculean burden imposed by these bills. The obligation to review all rule makings would, as a practical matter, divert Congress from existing important legislative business which already takes more than one hundred percent of the available time.

I do not believe that the legislative measures before the Subcommittee today would sit well with the American people. The environmental laws that would be subverted by these proposals are popular and effective.

Although much remains to be done, the environmental protection laws enacted over the past 25 years have been produced a clear and measurable improvement in our quality of life. Urban smog levels have dropped dramatically in most cities as a result of the Clean Air Act. Rivers and lakes that were once literally cesspools of human and industrial waste are now safe to swim and fish in thanks to the Clean Water Act, and waterfronts across the country have been revitalized as a result. A program in the 1990 Clean Air Act is working to protect our planet's stratospheric

ozone shield. Our laws have worked to preserve America's unique and magnificent natural areas, and to save important wildlife like the bald eagle, the gray whale, and the California condor—from the brink of extinction.

Pollsters from both sides of the aisle have repeatedly found that an overwhelming majority of Americans favor preserving or strengthening our environmental laws over measures to reduce the regulatory burden. (Among the many opinion polls showing two to one or better public support for environmental protection are polls by: Gallup (May 1995); Melman (June 1995 and July 1996); Morris (June, 1995; Va.), Greenberg (May 1995); ABC News/Washington Post (May 1995), Times Mirror (April 1995 and October 1995); Time/CNN (Jan. 1995 and Sept. 1995); Wirthlin (Aug. 1995); Luntz (March 1995); American Viewpoint (December 1995); Environmental Research Associates (March 1996); Research Strategy Management Inc. (December 1995); and Lake Research (January 1996 and March 1996)).

In this light, it is not surprising that recent efforts to weaken environmental protection through indirect routes—such as the anti-environmental budget riders or the so-called regulatory reform initiatives—have proven broadly unpopular. The legislation before the Committee today is in fact a more extreme version of earlier indirect efforts to remake the regulatory process and block the enforcement of health and environmental protection laws. The proposed regulatory moratorium (H.R.450) temporarily barred agencies from issuing new rules. The "regulatory reform" initiative (H.R. 1022) established new bureaucratic obstacles to the issuance of regulatory safeguards and authorized lawsuits from polluters to block new rules. But neither of these attacks went so far as to permanently deny environmental agencies the authority to carry out our environmental laws, as these bills would do.

Nor is it clear what exact problem this ambitious legislation seeks to address. Although rhetoric regarding over-regulation is commonplace, there has been precious little documentation of the specific problems that the legislation would solve. Certainly, in the environmental area there is no indication of any real problem so sweeping as to warrant the extreme response under consideration today. After all, Congress already has the authority to intercede any time it chooses and block forthcoming rules or reverse existing ones, and under H.R. 3136 enacted last spring all rulemakings are subject to a 60 day layover during which Congress can vote to block their issuance.

In closing, I would urge the Committee to consider carefully the sweeping negative repercussions of the legislation before it today, to avoid the Congressional gridlock and permanent government shutdown that these proposals would produce, and to reject these attacks on a generation of popular and successful environmental and health protection laws.

Mr. GEKAS. We thank the gentleman. The time of the witness has expired.

We turn to the next witness, Mr. Taylor.

STATEMENT OF JERRY TAYLOR, DIRECTOR, NATURAL RESOURCES STUDIES, THE CATO INSTITUTE

Mr. JERRY TAYLOR. Thank you, Mr. Chairman, and thank you, members of this subcommittee, for calling these very important hearings.

The previous witness, Mr. Wetstone, concluded by saying he was unaware of any sweeping problems that would necessitate such a radical adoption as the legislation in front of this subcommittee. Let me give you five serious problems which necessitate this kind of legislation.

First, delegation circumvents the substantive hurdles placed in the path of lawmaking and, thus, undermines the idea that laws should be adopted only if near overwhelming political consensus is found to exist. A classic example of this problem was back in the late eighties on the debate over the so-called gag rule. Now aside for a moment about whether that rule was a well-intentioned or a good idea or not, for years in the eighties Congressmen had tried to adopt legislatively exactly the rule that the Mr. Sullivan adopted from an administrative standpoint, and every single year this legis-

lation was defeated by Congress. It could not pass. Yet, with the Bush administration, Mr. Sullivan felt with administrative fiat he would implement these rules and then spark a tremendous controversy.

In other words, the hurdles that are in front of this legislation worked as intended. The Founding Fathers established a system that requires large consensus before bills could be passed. Political consensus did not exist to back the gag rule, but all of those hurdles, then, worked against those who wanted to repeal the gag rule. Time after time, opponents of the gag rule were able to marshal enough votes to get legislation repealing the rule through both Chambers, but they didn't have enough votes to overcome the Presidential veto. It wasn't until President Clinton's selection in 1993 when by administrative order the gag rule was repealed. Now, again, aside from whether people, members of this subcommittee, like the gag rule or not, this is a tremendous example of how it is that delegation allows Government to circumvent the necessary requirement that consensus exist before a law is adopted.

The second problem is that it effectively deputizes tens of thousands of bureaucrats with broad and imprecise missions with a command to, "Go forth and legislate." In other words, the Congress is somewhat limited by how much control it can have in the private lives of Americans by there only being so many hours in the day. There's only 400-and-some-odd of you, but if there is now, all of a sudden, the capability of Congress to deputize about 100,000 bureaucrats to go help write that law, the natural time constraints on Congress all of a sudden fall apart.

A classic example is in the telecommunications bill recently passed. There is an established procedure by which the definition of what universal service shall mean when it comes to telecommunications services. It is delegated to an advisory panel of the Government, and this advisory panel has the power, by unilateral fiat, to require private businesses to provide subsidized services to various interest groups with no review by Congress. Congress, apparently, didn't feel they had time to make these sorts of determinations, so they booted them up to the executive branch, an appalling example of delegated lawmaking.

A third example is that delegation invites a dangerous concentration of power in executive branch agencies and unwisely ignores our founders' deep commitment to the separation of powers within Government. As John Adams remarked in a pamphlet in 1776, "A single assembly possessed of all the powers of Government would make arbitrary laws for their own interest, execute all laws arbitrarily for their own interest, and adjudicate all controversies in their own favor."

Of course, James Madison in Federalist 47 said virtually the same thing, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

And the parade of horrors that Congress constantly hears about run-amuck regulation that is based on little common sense but an arrogance of Government stems exactly from that concentration on

power where agency officials are judge, juries, and executors of their own mandates.

Fourth, delegation implicitly rejects the original design of the Constitution in favor of an administrative state largely unaccountable to the American people or their elected representatives. The court system does oversee the sorts of regulation as proposed, as pointed out earlier by Mr. Reed, but it turns out that judges have allowed basically agencies to dictate their own powers.

For example, it has been rightly pointed out by Mr. Kessler at the FDA that it basically up to the FDA whether it has power over cigarettes or not, and judges have held that decision. In fact, it was one of the offered reasons by Mr. Kessler for why he can issue these regulations. They're not answerable to Presidents necessarily, as we've found out in several cases in the Bush administration, and unless Congress can muster veto-proof majorities, they're not accountable to Congress either.

And, finally, delegation allows Congress to simultaneously support and oppose laws and, thus, escape responsibility for the law. A classic example of this is the Pay Raise Commission. Of course, in the pay raise situation we had a scenario in which Congress did not want to be seen as voting for its own pay hikes. They delegated this power to a commission and jimmied it so that the Pay Raise Commission could make whatever decision it liked impervious to congressional vote. Of course, the public and the journalists saw through this rouse and it backfired on the proponents of this Commission, but this is a classic example of how Congress likes to say, "Oh, we voted against 'X,' but we couldn't control the agency. It's not our fault that these sorts of rules were issued. It's the fault of the administrative branch."

For these reasons, I would urge serious consideration of these bills.

[The prepared statement of Mr. Jerry Taylor follows:]

PREPARED STATEMENT OF JERRY TAYLOR, DIRECTOR, NATURAL RESOURCE STUDIES,
THE CATO INSTITUTE

INTRODUCTION ¹

In 1995 the 104th Congress attempted to deal with our \$500 billion regulatory burden by regulating the regulators. Senate Bill 343, the Dole-Johnston Regulatory Reform Bill, would have grafted a new web of rules—mandating cost-benefit analysis and scientific risk-assessment—onto the impenetrably dense administrative structure that already exists.

Giving regulatory agencies a dose of their own medicine is a laudable idea, but it will not solve our current dilemma. Indeed, by focusing chiefly on the monetary costs imposed by the current regulatory regime, congressional reformers have misconstrued the nature of the threat that regime poses. Instead of reinventing the regulatory state, Congress should take back its power to make the law.

Since the New Deal, Congress has ceded more and more of its legislative authority to executive branch agencies. This delegation of lawmaking power is ill advised and illegitimate, for several reasons:

Delegation violates the Constitution, subverting the central structural principle of that document: the separation of powers.

Delegation severs the people from the law, undermining democracy by allowing vitally important decisions of governance to be made by unelected, unaccountable officials.

¹This testimony draws heavily from material prepared by David Schoenbrod and Gene Healy for a forthcoming Cato Institute Policy Analysis.

Delegation is a political shell game, allowing legislators to simultaneously support the benefits and oppose the costs of regulation.

Most importantly, by allowing those who enforce the law to make the law as well, delegation subjects the lives, liberty and property of Americans to arbitrary rule.

Reservations about delegation are not limited to one side of the political spectrum; recently, concerns about the extent to which Congress has relinquished its lawmaking authority have been expressed by civil libertarians such as the ACLU's Nadine Strossen, good-government reformers like former Sen. Bill Bradley and Debra Knopman of the Progressive Policy Institute, committed progressives such as the New Republic's Jacob Weisberg, and constitutional originalists such as former Judge Robert Bork and Judge Douglas Ginsburg. Despite their disparate perspectives, these thinkers have in common a concern for the vitality of our republican system of government—a vitality that has been sapped by Congress's refusal to take responsibility for the law. That vitality can only be reclaimed by forcing the peoples' representatives to reclaim the law. Reclaiming the law will require a restoration of the scheme of separation of powers outlined by the Framers—a return, in other words, to the original design.

THE ORIGINAL DESIGN

The separation of legislative, executive, and judicial powers is the central principle of our Constitution's architecture. This structural principle, according to legal scholar Rebecca Brown, is "a vital part of a constitutional organism whose final cause is the protection of individual rights." Indeed, it was because the powers of the federal government were both enumerated and separated that most of the delegates to the Constitutional Convention thought that individual liberty could be preserved without a Bill of Rights. Alexander Hamilton held that the Constitution's system of separated and enumerated powers was "itself, in every rational sense, and to every useful purpose, A Bill of Rights."

The doctrine of separation of powers attained its axiomatic status for the founding generation in part through the historical experience of the colonies in their struggle with Britain, and in part through the writings of a number of influential political theorists. The Declaration of Independence's bill of particulars against George III indicted the British king for several violations of the principle, among them, subverting the independence of the colonial legislatures, and making "judges dependent on his will alone." The doctrine had also been articulated by, among others, Locke, Blackstone, and, especially, Montesquieu, whom Madison called "the oracle." As constitutional historian Forrest McDonald notes, "American republican ideologues could recite the central points of Montesquieu's doctrine [of separation of powers] as if it had been a catechism."

Like Montesquieu, the Framers viewed political liberty as a condition in which citizens are free from arbitrary power and can expect to be secure in their persons and property. As Montesquieu put it in *The Spirit of the Laws*, "The political liberty of the subject is a tranquility of mind, arising from the opinion each person has of his safety." Concentration of two or more of the three classes of power—legislative, executive, judicial—in a single organ of government would destroy that tranquility, for reasons that John Adams expressed succinctly in a pamphlet published in 1776: "Because a single assembly, possessed of all the powers of government, would make arbitrary laws for their own interest, execute all laws arbitrarily for their own interest, and adjudge all controversies in their own favor." According to the late Malcolm P. Sharp, "Solicitude for liberty and property, and not unreasonable fear of what majority rule might do to them" were the primary impetus behind the enshrinement of separation of powers in the various state constitutions and its role in shaping the federal constitution.

To the end of preserving individual liberty and the rule of law, therefore, the first three articles of the Constitution neatly apportion the legislative, executive, and judicial powers respectively, to three separate bodies. Article I states, "All legislative powers herein granted shall be vested in a Congress of the United States"; Article II vests the executive power in the president; and Article III provides that the judicial power shall be vested in the Supreme Court and any inferior courts Congress decides to create. Neither the Framers nor Montesquieu adhered to a doctrine of pure separation of powers—a theory that would hermetically seal each department from the others. But the deviations from that principle are few, and explicitly prescribed.² Indeed, Madison devoted *Federalist* 47 to defending these minor deviations

²The President participates in the legislative process via the presentment clause and his veto power. The Vice President is given the tie-breaking vote in the Senate. The Senate confirms

from a theory of pure separation, readily granting that, were the proposed constitution guilty of a tendency toward mixing the legislative, executive, and judicial powers, "no further arguments would be necessary to inspire a universal reprobation of the system."

The precise limits of each respective function are not defined within the text of the Constitution, but that does not mean that the differences between them are incapable of being discerned. In an elegant *reductio*, Gary Lawson of the Northwestern University School of Law writes, "Consider, for example, a statute creating the Goodness and Niceness Commission and giving it power 'to promulgate rules for the promotion of goodness and niceness in all areas within the power of Congress under the Constitution.'" Clearly, such a commission would both make and enforce the law.

Statutes that express goals, even specific ones, but leave it to the executive branch to generate the rules binding on private conduct, delegate the power to make law, and are thus illegitimate. John Locke, whose authority among the founding generation was rivaled only by Montesquieu's, held that the legislature "cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others."

A statute meeting the test of non delegation should clearly resolve most cases that arise under it. A person interested in whether certain conduct is prohibited should, under such a statute, be able to discern the answer from reading it. All statutes require interpretation, but the job of a law interpreter in the executive or judicial branch is to look backward to what the lawmakers intended, rather than forward, to determine what would be wise public policy. Cornell University Law School professor Cynthia R. Farina states the relevant question thus, "Are decisions of public policy being made by someone other than those who the people have chosen as their representatives?" If so, then the statute in question fails the test of nondelegation contemplated by the Constitution. Under a revitalized nondelegation doctrine, there will indeed be hard cases—instances in which there is no "bright line" between interpreting the law and actually making it; however, the vast majority of regulatory rulemakings issued under the current system do not constitute hard cases.

THE CONSTITUTION IN EXILE

Before the New Deal, wholesale delegation of legislative authority to the executive was largely unknown in the United States, at least during peacetime. With the coming of the Great Depression, President Franklin Delano Roosevelt sought sweeping authority to manage the U.S. economy. With the passage of the National Industrial Recovery Act of 1933, he got it. The NIRA authorized industrial and trade associations to draw up codes designed to raise prices and restrict production; if the president found the codes unacceptable, he was empowered to immediately issue and enforce them. Upon hearing of the NIRA, Benito Mussolini exclaimed, "Ecco un ditatore!" ("Behold a dictator!")

In 1935 the Supreme Court emphatically rejected the industrial code provisions of the NIRA in *A.L.A. Schechter Poultry Corp. v. United States*. The Court, led by Chief Justice Hughes, argued that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." In his concurring opinion, Justice Cardozo famously characterized the industrial code provisions as "delegation running riot." But after Roosevelt's 1937 attempt to subvert the judiciary's independence by enlarging the Court, the Court never again struck down a New Deal statute on delegation grounds. Fear of Court-packing concentrated the mind wonderfully, and the judiciary chose not to stand in the path of the administrative state.

The nondelegation doctrine joined the doctrine of enumerated powers in jurisprudential limbo, as an integral part of what Judge Douglas Ginsburg has called "the Constitution-in-Exile." Along with their "textual cousins," the Necessary and Proper, Contracts, Takings, and Commerce clauses, these doctrines have been, according to Ginsburg, "banished for standing in opposition to unlimited government."

By 1944 the Court recognized few if any limits on Congress's ability to delegate. In *Yakus v. United States* it held that Congress could delegate to an executive agent the power to set maximum prices for virtually all goods throughout the economy. What has followed since the New Deal and the Second World War has been a line of cases in which "the judiciary typically waxes eloquent about the serious breach were Congress ever to transfer its legislative power to other parties, after which it finds a way to uphold the delegation."

... treaties and important executive branch appointees. It also has the judicial power to try impeachments.

That line of cases culminates in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council* (1983), in which the Court showed extraordinary deference to administrative agencies' interpretations of their own authority. The *Chevron* case arose out of a dispute over the meaning of the term "source" in the 1977 amendments to the Clean Air Act. Initially, the Environmental Protection Agency under President Carter defined the term so that it applied to each source of emissions within any given factory. But under the Reagan administration, the EPA issued a more flexible rule that considered the plant as a whole to be the "source." Though the Court found it impossible to discern a legislative intent with regard to this issue, it upheld the EPA's decision, holding that when a statute is silent on a particular issue, Congress can be understood to have delegated the power to make the law to the agency. And, according to Justice Stevens's majority opinion, "Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Professor Cass Sunstein of the University of Chicago School of Law suggests that the *Chevron* precedent, which allows agencies to determine the extent and nature of their own authority, ignores the wisdom embodied in the old adage about trusting foxes to guard henhouses.

With the judiciary's abdication of its constitutional role, we are left with a legal status quo that effectively centralizes all governing functions in the executive branch agency: Congress passes a statute endorsing a high-minded goal—accommodation of the handicapped, safe drinking water, protection of wildlife—the executive branch agency then issues and enforces the rules governing individual behavior; the judicial branch, for its part, grants "controlling weight" to the agency's interpretations of its own authority. In this way, the modern administrative state comes perilously close to realizing the Framers' definition of despotic government, articulated by James Madison in the *Federalist* 47: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

DELEGATION RUNNING RIOT

The administrative state erected since the New Deal is a massive amalgamation of Professor Lawson's "Goodness and Niceness Commissions." In the service of broadly popular societal goals, Congress has delegated ever-increasing amounts of legislative authority to the executive branch. What follows are just a few illustrative examples of delegation's role in modern government and the concomitant threats to civil liberty and democratic government. This list makes no pretense of being exhaustive; huge swaths of our statutory law, and most of the Federal Register would fail the test of a revitalized non delegation doctrine.

The FDA and Tobacco

On August 10, 1995 the Food and Drug Administration unveiled a proposed package of new regulations ostensibly designed to reduce teenage smoking. Among the proposals: (1) the FDA would ban all outdoor advertising within 1,000 feet of any playground, or elementary or secondary school; (2) in magazines that could conceivably be read by children, the agency would limit advertising to black text on white background; (3) all cigarette advertising would have to include the phrase "Cigarettes—A Nicotine Delivery Device"; (4) the agency would ban vending machines, self-service displays, sale and distribution by mail, individual cigarette sales, and cigarette packs of less than 20.

There are any number of constitutional objections to be made to the FDA's proposal, among them that it: relies on an absurdly broad conception of the Commerce power; violates First Amendment protections of commercial speech; encroaches on state prerogatives under the Tenth Amendment—but most salient for the purposes of this paper is that the FDA's proposal is based on a sweeping delegation of legislative authority.

The FDA's proposal constituted a rather dramatic turnaround, since the agency had long held that it did not have the authority under the Food Drug and Cosmetic Act to regulate cigarettes unless the manufacturer made health claims. In fact, in 1977 the FDA commissioner rejected a petition filed by the anti-smoking activist group Action on Smoking and Health requesting that the FDA restrict the sale of cigarettes to pharmacies. ASH challenged the commissioner's decision in the federal courts. In *ASH v. Harris*, the U.S. Court of Appeals upheld the commissioner's decision, but made it clear that the FDA was free to take a more expansive view of its authority should the agency choose to do so: "Nothing in this opinion should suggest that the Administration is irrevocably bound by any long-standing interpretation and representations thereof to the legislative branch. An administrative agency is clearly free to revise its interpretations."

Dr. David Kessler's appointment as FDA commissioner in 1990 heralded the arrival of a new, more aggressive agency—one that was fully prepared to exploit such judicial deference. Kessler's FDA crafted a creative interpretation of the Food Drug and Cosmetic Act—one which would allow the agency to significantly restrict tobacco products without endorsing outright prohibition. Rather than regulate tobacco itself as a drug—because cigarettes could not possibly be approved as safe and effective—the FDA bases its claim for jurisdiction over cigarettes on the 1976 Medical Device Amendments to the Food Drug and Cosmetic Act. The agency intends to regulate cigarettes using the restricted device provisions of that act. Specifically, the agency argues that cigarettes are nicotine delivery devices, and thus subject to regulation as a combination drug/device product. "Chew" and "snuff," tobacco leaves that are used orally, are also considered "devices" for the purposes of the regulations. The agency claims that its authority over restricted medical devices allows it to regulate cigarettes and other tobacco products without taking them off the market completely. This approach, according to the FDA, "affords the most . . . flexible mechanism for regulating the sale, distribution, and use of these products."

The FDA's proposed regulations were initially submitted to President Clinton, who approved them. The Washington Post's front-page article on this development led with this curious sentence: "President Clinton has given the Food and Drug Administration for the first time the authority to regulate cigarettes." Though clearly inaccurate with regard to constitutional law—authority to enforce a statute through regulation derives from Congress, not the president—the Post writers' phrasing accurately described the current legal environment of unrestrained executive authority. The same article reported that President Clinton promised to halt implementation of the FDA rulemaking if Congress would pass the proposed regulations into law.

Such regulatory blackmail demonstrates how far we've departed from our constitutional framework, in which Congress legislates and the executive branch enforces the law. Instead, pace Clinton's suggestion, the executive branch can use its illegitimate and unconstitutional ability to make law as a bargaining chip to force Congress to legislate. Indeed, since 32 senators voiced their opposition to the proposals in a December 28, 1995 letter to the FDA, it is safe to conclude that, absent executive blackmail, such restrictions could not be passed through normal constitutional channels.

The FDA's ability to make the law stems from a combination of statutory vagueness and judicial deference. This dangerous combination has resulted in metastasizing authority for the agency, as its oversight of medical devices illustrates. The FDA's definitional agility with regard to cigarettes is hardly its most expansive attempt to assert jurisdiction using its medical device authority. In the last several years the agency has invoked that authority to claim oversight of such common consumer items as weight lifting equipment, mouthwash, sunglasses, shoe deodorizers, electric toothbrushes, and television remote controls.

Three months after releasing its draft proposal on cigarettes, the FDA demonstrated just how broadly it views its ill-defined powers to regulate medical devices. On December 11, 1995 the agency employed that authority to head off a threat to—of all things—airline safety. Pilots for carriers serving Las Vegas had complained that the outdoor laser light shows put on by area casinos were occasionally blinding them and putting their passengers in jeopardy. The FDA, invoking its authority to regulate lasers as medical devices, imposed a moratorium on all laser light shows anywhere within 20 miles of the three airports serving Las Vegas. A spokesman for the FDA said that the agency would not hesitate "to extend its coverage to other locales or nationwide" if it becomes necessary.

Clearly, laser light shows are not intended to, and cannot be, used to diagnose, cure, treat, or mitigate disease, nor do they affect the structure or function of the human body. But FDA regulators do not view themselves as executive agents with defined and limited public authority. Instead, they see themselves as public guardians with an indeterminate and open ended mandate to do good.

Wetlands Regulation

With the Federal Water Pollution Control Act amendments of 1972, Congress delegated to the Army Corps of Engineers the authority to require permits for the dumping of dredged or fill materials into the "navigable waters" of the United States. By 1977 the Corps had defined its own mandate broadly enough to allow it to regulate wetlands, including "swamps, marshes, bogs and similar areas"—private property that was not "navigable" in the traditional sense of the word.

In *U.S. v. Riverside Bayview Homes* (1985) the Supreme Court upheld the Army Corps of Engineers' broad interpretation of its own authority. Citing *Chevron*, the Court, led by Justice Byron White, held that "an agency's construction of a statute

is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." To bolster the claim that the Corps' definition of "navigable waters" was a reasonable interpretation of Congress's intent, Justice White invoked the legislative history of the 1977 amendments to the Clean Water Act. Congressional critics of the Corps' power grab had attempted to insert a more restrictive definition of "waters" into the 1977 amendments. That definition, which would have limited the Corps to regulating waters that were actually navigable, passed the House but stalled in the Senate. Justice White argued that "A refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction." But this is to turn the Constitution on its head: the Framers erected significant barriers to the passage of legislation in an attempt to ensure that each new rule binding on private conduct would be duly considered. Under the Constitution, a law must meet with the approval, or at least the acquiescence, of the representatives of three different constituencies: the House, the Senate, and the President. But when Congress is allowed to delegate its legislative authority, the executive branch agency makes the law, and all the constitutional hurdles that are supposed to stand in the way of frivolous lawmaking then obstruct those seeking to repeal frivolous executive-branch lawmaking.

Emboldened by the Court's approval, the Army Corps of Engineers issued an even more expansive definition of navigable waters. By 1987 "navigable waters" had come to mean land that contained certain kinds of vegetation, soil hydrology, or was saturated with water for at least seven days a year.

In 1989 Ocie and Carey Mills, a father and son from Florida, ran afoul of the Corps' metastasizing authority over land use. The Millses were found guilty of "discharging pollutants into the navigable waters of the United States." The "waters" in question consisted of a wooded waterfront lot that had no standing water on it. The Millses were sentenced to 21 months in jail each, and one year of parole. Though sympathetic to the Millses' plight, Judge Vinson of the U.S. District Court (N.D. Florida) found himself bound by precedent to uphold their conviction. He wrote: "A delegation doctrine which essentially allows Congress to abdicate its power to define the elements of a criminal offense, in favor of an unelected administrative agency such as the Corps of Engineers, does violence to this time-honored principle . . . Deferent and minimal judicial review of Congress' transfer of its criminal lawmaking function to other bodies, in other branches, calls into question the vitality of the tripartite system established by our Constitution. It also calls into question the nexus that must exist between the law so applied and simple logic and common sense. Yet that seems to be the state of the law."

The Abortion Gag Rule

Supporters of abortion rights had reason to lament sweeping delegation of law-making authority in 1988, when Secretary of Health and Human Services Louis Sullivan decided to change the rules governing federally funded family planning organizations. Title X of the Public Health Service Act, enacted in 1970, authorized the Secretary of H.H.S. to make grants to and enter into contracts with public or non-profit private clinics offering "a broad range of acceptable and effective family planning methods and services." Though the legislation prohibited the use of Title X funds to pay for abortions, it was silent as to whether advice about abortion could be given at federally funded clinics. But almost 20 years after the passage of the initial legislation, H.H.S. Secretary Sullivan issued regulations that summarily forbade clinics receiving Title X funding to provide information about abortion.

In doing so, Secretary Sullivan implemented by fiat a policy that two years earlier had failed to garner a majority of votes in Congress. In 1986 Sen. Orrin Hatch (R-UT) and then-Rep. Jack F. Kemp (R-NY) introduced legislation that would have prohibited Title X clinics from discussing abortion; that legislation was rejected by Congress. Sullivan's 1988 regulations accomplished what Hatch and Kemp could not.

Pro-choice advocates were outraged by Sullivan's implementation of the gag rule. They argued that it had never been Congress's intention to prevent clinics from advising their clients, often indigent women, about all safe, legal, and available medical options.

Sullivan's action was challenged in federal court and eventually upheld by the Supreme Court in *Rust v. Sullivan* (1991). In his dissenting opinion, Justice Blackmun argued that the H.H.S. rules violated constitutional rights; he condemned the rules as "content-based regulation of speech" and an assault on abortion rights. Rehnquist's majority opinion makes a convincing case that the regulations did not impinge on constitutional freedoms, since "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." However, it was

not a legislature that made this far-reaching decision, but an executive branch appointee, insulated from democratic control.

Nonetheless, the Court once again held that executive appointees have broad interpretive authority. Citing *Chevron* once again, the Court, led by Chief Justice Rehnquist, reasoned that it was not necessary to "dwell on the plain language of the [Title X] statute because we agree with every court to have addressed the issue that the language is ambiguous . . . [When] we find [that] the legislative history is ambiguous and unenlightening on the matters with respect to which the regulations deal, we customarily defer to the expertise of the agency." But, as was the case with wetlands regulation, the Court's deference essentially placed lawmaking power in the hands of the executive agency and forced opponents of the rule to leap the procedural hurdles the Framers erected to protect liberty.

As the Framers intended, those hurdles proved difficult to surmount. Though popular opinion was against the gag rule—a 1991 Harris poll found that 78 percent of Americans thought Congress should overturn it—Congress was unable to pass veto proof legislation repealing Sullivan's regulations. President Bush twice vetoed legislation revoking the gag rule, and the rule survived until President Clinton overturned it by executive order on January 22, 1993. It thus took five years and two intervening presidential elections to revoke Louis Sullivan's decree.

It could be argued that some of the examples above more clearly represent usurpations of statutory authority, rather than over broad delegations. For example, when Congress tasked the FDA with reviewing and approving new medical technology, it could not possibly have intended that the agency involve itself in airline safety. Nonetheless, rule by bureaucratic fiat is the inevitable product of a political culture conditioned by wholesale delegation of legislative authority. That political culture, and its effects on the behavior of executive branch regulators, was noted by James Landis, one of the leading legal theorists of the New Deal and one-time chairman of the Securities and Exchange Commission. During his tenure at the SEC, Landis observed that: "One of the ablest administrators . . . never read at least more than casually, the statutes he translated into reality. He assumed that they gave him power to deal with the broad problems of an industry, and upon that understanding he sought his own solutions."

Having vested unelected officials with the power to make the law, legislators should not be surprised if their delegates interpret that power broadly. Indeed, given the current legal environment of promiscuous delegation on the part of the legislative branch, coupled with blithe deference on the part of the judiciary, it is little wonder that regulators conceive of themselves as having virtually unchecked power to do good.

THE DUBIOUS BENEFITS OF DELEGATION

Clearly, wholesale delegation of lawmaking power comes with significant costs. Does it bring corresponding benefits? Defenders of the current regulatory regime argue that modern government cannot operate without delegation of legislative authority. Indeed, the Supreme Court said as much in a 1989 case involving a statute authorizing a commission to make rules governing criminal sentencing: "Our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." This argument reveals misplaced priorities—it puts the alleged needs of the modern administrative state ahead of the question of constitutional legitimacy. Congress's "job" after all, is to safeguard the framework of ordered liberty envisioned by the Constitution. Even so, the claims that are often made for the efficacy of delegation are vastly overblown.

Rule by Experts?

According to defenders of delegation, agency officials are experts who make technical decisions, and legislators are generalists who make broad policy decisions. But, as discussed above, Congress usually cannot delegate the technical issues in lawmaking without also delegating the broad issues of policy. Thus, lawmaking inevitably reflects moral judgments about how to balance and attain competing goals. According to political scientist Robert Dahl:

No intellectually defensible claim can be made that policy elites . . . possess superior moral knowledge or more specifically superior knowledge of what constitutes the public good. Indeed, we have some reason for thinking that specialization, which is the very ground for the influence of policy elites, may itself impair their capacity for moral judgment. Likewise, precisely because the knowledge of the policy elites is specialized, their expert

knowledge ordinarily provides too narrow a base for the instrumental judgments that an intelligent policy would require.

Perhaps for this reason, as well as because of the politics of the appointment process, most agency heads are not scientists, engineers, economists, or other kinds of technical experts. From the EPA's inception in 1970, seven of its eight administrators and seven of its nine assistant administrators for air pollution have been lawyers. Moreover, as one observer has noted, "the New Deal concept of the 'expert agency' breaks down in the modern context of health and environmental regulation. An agency addressing complex scientific, economic, and technological issues must draw upon so many different kinds of expertise that no individual employee can know very much about all of the issues involved in a typical rulemaking."

Meanwhile, generalist legislators often vote on laws—such as those setting the emission limits for new cars—the merits of which depend upon the resolution of hotly contested technical disputes. Although both agency heads and legislators often lack the expertise to evaluate technical arguments by themselves, they can get help from agency staff, government institutes (for example, the Centers for Disease Control), and private sources (for example, medical associations, private think tanks, and university scientists). In addition, legislators request advice from their own staffs, committee staffs, and various congressional offices. By paying attention to the source, amount, and tenor of competing advice, both agency heads and legislators can make judgments involving technical issues without fully understanding them.

Another problem with the theory of agency expertise is the assumption that agencies are sufficiently insulated from politics to make their decisions scientifically, rather than politically. But, agencies are, of course, not really insulated from politics at all, but rather are subject to all kinds of subtle and not so subtle pressures from members of Congress and the White House staff. Agencies are vulnerable to such pressure because they and their staffs have interests of their own, such as getting wider powers, a larger budget, and access to higher appointed positions. Perhaps agency lawmaking is somewhat more removed from legislative politics than is congressional lawmaking, but, in acting behind closed doors to pressure agencies, members of Congress are largely free from electoral accountability.

Is Congress Too Busy?

CEOs of large private organizations usually delegate details to underlings in order to leave enough time to decide the broad issues of policy. New Dealers argued for delegation on similar grounds; "time spent on details [by Congress] must be at the sacrifice of time spent on matters of the broad public policy." Yet Congress does not act like an institution too short of time to get involved in details, especially as it has turned from broad to narrow delegation. For example, the Clean Air Act and many other statutes give agencies copious instructions on the handling of many complex questions. The 2,823-page-long Internal Revenue Code legislates in great detail, often creating rules so specialized that they apply to only one taxpayer. Congress legislates about details on an even more massive scale in the annual federal budget, which in 1991 ran to 1,527 printed pages on five and a half pounds of paper. That budget, like others, not only decides broad policy—such as the allocation of funds among major program categories—but also dictates tiny particulars of program administration. For example, Congress decided that \$2.5 million of the \$55.3 billion gross Department of Agriculture budget should go for the planning, design, and construction of a Poultry Disease Laboratory, and that it should be located in Athens, Georgia.

But in delegating to agencies, Congress often leaves open broad policy issues. Delegating major policy choices to a coordinate branch of government is altogether different than delegating details to underlings. Congress cannot do all of the agencies' work, but it can make the laws—that is, the rules binding on private conduct, which, after all, is the job the Constitution assigns to Congress. Under the Constitution, Congress can appropriately leave to the executive and judicial branches other tasks, such as deciding how to enforce those rules (for example, interpreting the laws and exercising prosecutorial discretion), organizing and running agency operations (for example, assigning tasks to the staff, hiring employees, buying equipment), managing public enterprises (for example, the post office or other government operations or property), and making recommendations to Congress (for example, proposing changes in laws).

Legislated laws can be quite general. For example, one section of the 1990 Clean Air Act Amendments mandates that the EPA base emissions limitations for many categories of sources on the levels achieved by the cleanest 12 percent of the plants in each category. Through this general formula, Congress established a rule of conduct applicable to many pollutants from many kinds of sources by stating the criterion separating permissible and impermissible conduct.

Enacting laws forces legislators to take political responsibility for imposing regulatory costs and benefits. In contrast, delegation allows Congress to stay silent about what the agency will prohibit, thus severing the link between the legislator's vote and the law, upon which democratic accountability depends.

Congress could achieve the public purposes that it now pursues through delegation in far less time than agencies take to make laws and in less time than delegation takes Congress in the long run. Acting by itself, Congress would not have to go through the same laborious processes that it requires of agencies. Congress currently accompanies delegation with detailed instructions on substance and procedure that constrain agency discretion. Writing such instructions would be unnecessary if Congress made the rules.

Congress could, however, ask for an agency's help in drafting law. For instance, it could require the agency to propose statutory language, prepare supporting analyses, and hold hearings on proposals. The agency's analysis undoubtedly would make use of the kind of information that now is considered in administrative rulemaking. The New Deal's leading theoretician of the administrative process, James Landis, advocated exactly this approach. He wanted agencies to propose laws, but not promulgate them. Landis wrote that agencies would have a better chance of breaking the stalemates that often prevent them from protecting the public if they could act as "the technical agent[s] in the initiation of rules of conduct, yet at the same time . . . have [the elected lawmakers] share in the responsibility for their adoption." As Landis recognized, since controversy often paralyzes the administrative process, "it is an act of political wisdom to put back upon the shoulders of the Congress" responsibility for controversial choices.

Delegation saves Congress from political accountability, but it does not save time. Delegation is time-consuming because instructing agencies on how to make the law is a complex task, as the length of the various Clean Air Acts suggests. Moreover, the issues that one Congress ducks by delegating often reemerge to consume the time of succeeding Congresses. Although the 1970 Clean Air Act sailed through with hardly a dissenting vote, half of the sessions of Congress from 1970 to 1990 undertook major efforts to rewrite the act, in addition to the large amount of time spent overseeing implementation of the act and doing casework on EPA lawmaking.

Is Legislation Quick Enough?

Some political leaders fear that the separation of powers mandated by the Constitution is unworkable because it leads to gridlock when the president and majorities in the House and the Senate do not all come from the same party. Those who use the negative term "gridlock," however, ignore the fact that the political inertia it describes is an integral part of the American Constitutional design. The Framers believed that laws should not be made unless they have the broad support that usually is necessary to get them through the Article I process. As Madison put it in *Federalist* 62, the Constitution is designed to curb the "facility and excess of lawmaking."

Some see delegation as a cure for divided government. Broad discretion allows agencies to make law without the permission of the House, Senate, or the president. However, because the president, the legislators, and their staffs influence the agency, the stalemate often continues after the delegation, but in a new context. Yet, because delegation has ostensibly given the agency the job of making the law, the elected lawmakers can shift to the agency much of the blame for failing to resolve the dispute. Delegation thus short-circuits the nation's only authoritative method of resolving disputes about what the law should be, and so puts protection of the public into an administrative limbo. The EPA's delays in producing the rules required by the Clean Air Act are typical of what happens under many other statutes.

The purported ability of agencies to protect the public quickly is more apparent than real for other reasons. The Administrative Procedure Act theoretically allows agencies to make law in two months, and even less in an emergency. It is tempting to compare such potential speed with the years that can pass while bills languish in Congress. Yet Congress can react quickly when it senses public support for quick action, while agencies ordinarily need years to make law.

THE REAL REASON CONGRESS DELEGATES

As the discussion above indicates, the typical rationales offered to support delegation are flimsy. Congress does not need to delegate in order to seek expert help; nor does Congress need delegation to ease its workload; still less does delegation help Congress avoid delays in addressing issues of broad public concern. Why then does Congress delegate?

One of the main reasons Congress delegates is to manipulate voter perceptions. Delegation allows legislators to represent themselves to some constituents as sup-

porting an action and to others as opposing it. Legislators, for example, can write different letters about the same issue to different groups of constituents, with each letter crafted to make the legislator appear to sympathize with that group's position. Such letters are, of course, far more private than publicly recorded yea or nay votes. As former EPA administrator Lee Thomas described delegation under the Clean Air Act, "Everybody is accountable and nobody is accountable under the way [Congress] is setting it up, but [the legislators] have got a designated whipping boy."

Congress's penchant for covering up its tracks via delegation is nowhere more starkly illustrated than in the congressional pay-raise controversy of 1988–89. In 1988 Congress used delegation to try to give its members a 50-percent pay raise without losing votes in the following election. It passed a statute that delegated to the Commission on Executive, Legislative, and Judicial Salaries the power to set pay for themselves and other top officials whose pay they linked to their own. Under the statute, if the commission were to grant a pay increase, another statute passed before—but not after—the increase went into effect could cancel it. When the commission recommended the 50-percent increase, some legislators introduced bills to cancel it. But this was part of a plan in which the congressional leadership would prevent a vote on the bills until it was too late to stop the increase. Legislators could then tell their constituents that they would have voted against the increase if given the chance—thus getting both the pay raise and the credit for opposing it.

However, the size of the increase, in an atmosphere of antipathy to Congress, provoked such a storm of protest and publicity that the public came to see through the charade. Embarrassed, the House leadership conducted a secret ballot among members to determine whether to hold a roll-call vote on the pay increase. Fifty-seven percent of the members who responded opposed a roll call vote, although 95 percent of the House members surveyed by Public Citizen claimed they had supported it. After public opposition to the pay raise approached 90 percent, Congress passed a bill to cancel it.

The pay raise controversy illustrates Congress's willingness to use delegation to manipulate voters' perception of its activities. In that particular case, manipulation failed—indeed backfired—because the public, aided by perceptive journalists, saw through the ruse. But manipulation through delegation is usually successful, because routine government action is neither so readily understood nor so pregnant with symbolic value as the pay raise was, and so eludes the sustained attention of the press and the public.

Not only does delegation let legislators avoid publicly recorded votes on hard choices, it also allows them to actively please conflicting interests by doing casework on their behalf. Casework, unlike roll-call voting, is not a matter of public record. Delegation thus allows members of Congress to function as ministers rather than legislators; they express popular aspirations and tend to their flocks rather than make hard choices.

Congresses huge reelection rates are in part testimony to the fact that the delegation ruse generally works. During the 1980s only 88 of 2,175 congressional seats were turned over because of an incumbent's defeat. With delegation members can usually escape being ejected from office except upon grounds that would oust a minister from the pulpit—scandal. In those exceptional cases in which incumbent legislators do lose elections, their defeat is far more likely to be caused by some escapade or by voting for a real law, such as a tax increase, than by how they shaped the law through delegation.

GETTING THERE FROM HERE

Despite the palpable political benefits of delegation—which allows congressmen simultaneously to support the benefits and oppose the costs of regulation—by the mid-1970s Congress began growing increasingly uneasy about the amount of power it had ceded to the executive branch. Popular complaints against arbitrary, capricious, and indecipherable regulatory laws began to have political effect, and Congress began to make noises about "reigning in the regulators." That noise has grown louder by the Congress, until today it is one of the clearest themes of the celebrated congressional "Contract With America."

The Legislative Veto

Rather than refrain from delegating legislative authority, Congress originally attempted to retain some control over executive branch agencies through the use of legislative veto provisions. The legislative veto usually takes the form of a clause in a statute that stated that executive branch action pursuant to the power delegated in the statute would take effect only if Congress did not veto it by resolution within a given period of time. Use of such clauses increased significantly with increased regulation during the 1970s.

This legislative tool was declared unconstitutional by the Supreme Court in the 1983 case *INS v. Chadha*. Congress had authorized the Attorney General to use his discretion in suspending deportation proceedings for selected "hardship cases" among illegal aliens. That discretion, however, was subject to disapproval via resolution by either house of Congress. Jagdish Rat Chadha was one of 340 illegal aliens whose deportation was suspended by the Attorney General in 1974. In 1975 the House of Representatives passed a resolution reinstituting deportation proceedings for Chadha and five others on the Attorney General's list. A majority of the Court, led by Chief Justice Burger, held that this one-House veto provision violated the separation of powers embodied in the Constitution. According to Burger's majority opinion, the legislative veto contained in the Immigration and Nationality Act allowed one House to make law without the participation of the other House and the president. According to the Court, the veto provision violated the Constitution's Presentment Clause, article I, section 7, clause 3, which requires that "every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President" for his signature or veto.

The Court's reasoning was somewhat perplexing; as Martin Shapiro of U.C. Berkeley School of Law has pointed out, if the veto provisions are legislative in nature, and thus violate the Presentment clause, what of the regulations that are vetoed? Writes Shapiro, "If the congressional veto was unconstitutional because it failed to allow for a presidential veto, then the delegation of its rulemaking powers by Congress to the agencies was even more unconstitutional." Nonetheless, the Court's decision invalidated scores of legislative veto provisions contained in other statutes.

The Breyer Proposal

In a lecture given at the Georgetown University Law Center later that year, Judge Stephen Breyer, now associate justice on the Supreme Court, presented a plan for a "veto substitute" that would allow Congress to retain control of the law while following the requirements of *Chadha*. Breyer's proposal would replace the legislative vetoes with statutory language stating that "the agency's exercise of the authority to which the veto is attached is ineffective unless Congress enacts a confirmatory law within, say, sixty days." Thus, under Breyer's scheme, the executive branch would largely be stripped of lawmaking power; agencies would recommend particular courses of action, but they would not have the effect of law until they passed through the normal constitutional channels.

But how could Congress possibly handle the volume of rulemaking that modern administrative government is said to require? In his Georgetown lecture, Breyer suggested changing the House and Senate rules to allow a special "fast track" for proposed regulations subject to the confirmatory law requirement. Thus, under the new Senate rules Breyer envisioned, when an executive branch agency proposed rules subject to such a requirement, a bill containing the text of that regulation would be introduced automatically under the name of the Majority Leader. That bill would not be referred to committee, nor would it be amendable, debatable, nor subject to filibuster; instead, the Senate would vote *yea* or *ne* on the bill within 60 days of its introduction. The House would adopt similar rule changes.

Breyer's proposal would allow Congress to follow the formal requirements of *Chadha* while preserving the substance of the legislative veto. Under Breyer's plan, if one House disapproves of a regulation subject to congressional oversight, it can essentially "veto" it. But the confirmatory law requirement Breyer proposed would change the political dynamic considerably: "The veto substitute imposes on Congress a degree of visible responsibility for the actions it confirms, a burden that the veto system allowed it to avoid."

The Nickles Amendment

Nineteen ninety four's Republican takeover of Congress gave new impetus to regulatory reform, and generated renewed interest in Breyer's proposal. Sen. Don Nickles (R-Okla.) offered an amendment to the 1996 debt ceiling legislation that embodied a weak form of the Breyer proposal. Passed into law as P.L. 104121, it delays implementation of major regulatory rules, giving Congress 60 days to pass a joint resolution invalidating a proposed rule. That resolution would then have to be signed by the president. But as Rep. Nick Smith (R-Mich.) has pointed out, the president is unlikely to sign a bill overriding a rule promulgated by his own administration. Thus, in many cases, the Nickles Amendment would require a two-thirds, super majority vote by Congress to overturn a regulation. As such, it is little better than the status quo, since it requires the opponents of bad law to leap all the constitutional hurdles originally set in place to check overzealous lawmaking.

The Significant Regulation Oversight Act

Representative Smith has introduced a better bill, one that comes closer to the confirmatory law requirement envisioned by Breyer. H.R. 2990, the "Significant Regulation Oversight Act of 1996," introduced on February 28, 1996, would require significant new rules to be affirmatively approved by both houses of Congress before going into effect. Which rules would be considered "significant" would be defined in the initial statutes providing for regulation. Thus, Congress would decide initially which types of rules could be passed by departments and agencies through the process outlined in the Administrative Procedures Act, and which would have to be legislatively enacted by Congress. For "significant" regulations, the agency would have to send its draft proposal to Congress.

Following Breyer's recommendations, the Smith bill provides for rules changes in the House and Senate allowing for "fast track" consideration of regulations. The agency's submission of a proposed regulation automatically creates a resolution to be introduced by the Majority Leader of each house. But, in contrast to Breyer's scheme, that resolution then goes to the relevant committee. Within 45 days, the committee must decide whether to report the resolution or vote affirmatively not to report it. If it does neither within the allotted time, the resolution goes to the floor automatically for an up or down vote, no amendments permitted.

The Smith bill also includes a provision for revising or revoking regulations passed prior to the bill's enactment. (Section 5) A petition to change or repeal such a regulation would be accepted when signed by 30 senators or 120 members of the House of Representatives. Such a petition would require the Majority Leader to introduce a joint resolution revising or repealing the regulation in question. This provision would make it easier for regulatory reformers to force floor votes on controversial regulations. A minority of reformers in either house could force their colleagues to take publicly recorded stands on issues they might prefer to duck. Milton Friedman referred to the weight of existing regulatory legislation—hotly debated, but once passed, untouchable—as "the tyranny of the status quo." Smith's bill provides a legislative weapon that can be used to fight that tyranny. As Smith notes, "By placing regulatory power once more into the hands of officials that ordinary citizens could speak with, influence, and vote for, those citizens would retain more control over their lives."

The Congressional Accountability Act

Freshman Rep. J.D. Hayworth (R-Ariz.), chairman of the House Constitutional Caucus, has introduced legislation that is more sweeping than either Rep. Smith's bill or the Breyer proposal. Unlike Smith's bill, H.R. 2727, the Congressional Responsibility Act of 1995, is not limited to "significant" regulations. Both the Smith bill and the Breyer proposal require Congress to affirmatively identify areas of authority that it wishes to subject to a confirmatory law requirement; in contrast, the Hayworth bill leaves almost nothing to the agencies' discretion: "This Act ends the practice whereby Congress delegates its responsibility for making regulations to unelected, unaccountable officials of the executive branch and requires that regulations proposed by agencies of the executive branch be affirmatively enacted by Congress before they become effective." The only regulations that the Congressional Accountability Act would exempt from congressional review are regulations pertaining to agency organization, personnel, and the like.

Like the Smith bill, the Hayworth bill operates along the lines originally suggested by Breyer. Agencies must submit their proposed regulations to Congress, whereupon the Majority Leader of each house is to introduce a bill enacting the regulation. Instead of the bill being referred to a committee. Under Hayworth's framework, any member of the respective house can move to proceed to consideration of the proposed regulation. The bill is unamendable, and debate is limited to one hour. All such bills must be voted on within 60 calendar days of their introduction. However, if a majority of either house votes to suspend the "fast track" rules outlined above, the bill will be considered in the same manner as other bills.

Rep. Hayworth's bill, if enacted, would represent an important first step towards ending the constitutional crisis caused by unrestrained delegation. One problem with the approach originally outlined by Breyer, and adopted by Rep. Smith, is that it allows Congress too much discretion over when to delegate. The Smith bill requires Congress to decide with each new statute, which decisions it would like to be held accountable for. Thus, the Smith approach requires Congress to strive continually not to delegate, despite the very real political benefits of doing so. The Hayworth bill cuts the Gordian knot, defining regulation broadly at the outset, and holding Congress accountable for anything that can properly be construed as law-making.

The main defect of the Hayworth bill, however, is that it would not effect delegations of legislative authority that occurred before its enactment. The tyranny of the status quo would continue unabated even if the Congressional Responsibility Act were to pass. Some rules changes along the lines that Rep. Smith's bill proposes—allowing petitions to expedite regulatory repeal—are therefore essential.

REGULATION WITHOUT DELEGATION

Would the end of delegation spell the end of the regulatory state? Many of delegation's defenders seem to think so. Theoretically, however, the entire code of federal regulations as it exists today could have been enacted under the rules changes proposed by Rep. Hayworth.

But of course it would not have been. The point here is not to show that under a revived nondelegation doctrine the current regulatory regime can survive unchanged. It is more likely that a return to nondelegation will mean a return to prescriptive laws, a new respect for federalism, and a renewed appreciation of the Framers' view that the chief danger to republican government lies in legislative overzealousness, not legislative inaction. If Congress is to reclaim the law, it will be necessary for Congress to do less, do it properly, and be held accountable for the results.

Defenders of the administrative state view regulators' freedom from accountability as a virtue of the system. As FDA commissioner David Kessler puts it, "There's a reason FDA commissioners aren't elected." Perhaps so, but it is not a reason that defenders of republican government are bound to respect. Indeed, the reason that Kessler hints at—regulators' sweeping authority to act on what they perceive to be the public good, free from the meddling of the people's representatives—is inimical to our free institutions as originally conceived by the Framers. In the original design, only judicial appointees were wholly insulated from public pressure. But, properly understood, the judiciary's constitutional role makes it "the least dangerous branch." Its power is essentially negative—it strikes down laws that violate the Constitution. The type of power Commissioner Kessler champions, and exercises, is of a different nature entirely. It is power over people, the power to make laws binding on private conduct. That power should not—must not—be exercised without responsibility.

CONCLUSION

Forty years ago 75 percent of Americans professed faith in the federal government to do the right thing most of the time. Now three quarters tell pollsters that they lack such faith. So strong is the public's distrust of government that a third of respondents in a recent Gallup poll agreed that the federal government represents "an immediate threat to the rights and freedoms of ordinary citizens." There has been much hand wringing of late over this sea change in public opinion. Following E.J. Dionne, pundits and polls repeatedly ask why Americans hate politics. They lament the current political culture in which Americans lack faith in their government; feel that they have no influence in the political process; and curse the politicians who offer them nothing but stale platitudes and non-issues in every campaign.

Few analysts, however, have examined delegation's contribution to this state of affairs. What plagues American political culture right now isn't really politics, if by politics we mean open, daylight debate over the affairs of state. What plagues us is runaway administrative government. The most important, far-reaching decisions in American government are no longer made by elected officials: they're made by executive branch appointees. Americans are right to believe that they have no control over the engines of government. And they're right to curse politicians who run on issues on which they can have very little impact: abortion, family values, support for "diversity," and the like. Over the past 60 years our elected representatives have abdicated their constitutional responsibility to make the law. A Fourth branch of government has effectively been created out of whole cloth. Our political culture will remain poisoned until we neutralize this branch and force Congress to accept direct accountability for its actions.

Mr. GEKAS. We thank the witness, and we turn to our last witness, Professor Hamilton.

STATEMENT OF MARCI A. HAMILTON, PROFESSOR OF LAW, BENJAMIN N. CARDOZO SCHOOL OF LAW

Ms. HAMILTON. Thank you, Mr. Chairman, for asking me to testify today.

Mr. GEKAS. Excuse me just for a moment.

Ms. HAMILTON. Yes.

Mr. GEKAS. We won't hold this against your time. We want to note the presence of the gentleman from Georgia, a member of the subcommittee, Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman.

Mr. GEKAS. You may proceed.

Ms. HAMILTON. I'd like to begin by commending the subcommittee for taking up this very timely and crucial issue. I'm going to make just three points in my oral testimony and refer you to my written testimony for further elaboration.

First, we are here today because there is increasing agreement that the administrative and bureaucratic state has gotten out of control. Some have tried to say that our 200-year-old Constitution has nothing to say to this. I am here today to tell you that the Constitution speaks directly to the problem and that current practice is unconstitutional.

The Constitution was designed for the purpose of avoiding a bureaucratic and unaccountable state. Just as we look back 200 years to the Framers to try to understand what they were thinking and doing, many of the Framers also looked back 200 years. They looked back to the Reformation era and to the unaccountable, bloated, and bureaucratic pre-Reformation Roman Catholic Church. These include James Madison, James Wilson, John Witherspoon, and many others. They took this problem very seriously, and they drafted the Constitution for the purpose of preventing the creation of the state that we have ended up with.

That's not the end of the story, though. The Constitution still exists and Congress still has the capacity to change the tack that has been incorrectly taken in this century.

The Framers chose independent decisionmaking authority for Congress Members. They flatly rejected direct democracy or town-meeting-style democracy, and they rejected a monarchy. They chose instead this representative system that requires Representatives to exercise independent judgment and to decide the hard policy issues of the day. The people have no right to instruct their Representatives. Legislation is legitimate, whether the people agree with the legislation or not. What this means is that legislators, by the Constitution, have been given strong responsibility and heavy responsibility to make the hard policy choices that should govern this country.

Thus, under the Constitution we have real power in the legislative branch; we have lawmaking responsibility, and an obligation to communicate with the people about those decisions. Delegation in its current state dis-serves all of those constitutional features and undermines the constitutional goal, which was to avoid a bureaucratic state.

Now the Supreme Court has recognized this principle, and they have said that the Constitution requires Congress to exercise independent decisionmaking responsibility. It's called the nondelegation doctrine. It has not, however, been enforced by the Court with vigor, and Congress has not taken up this standard itself in this century. Yet, Congress bears equal responsibility to ensure that it conducts its business in a constitutional manner.

The now widespread practice of delegation of the hard policy choices betrays the Framers' constitutional design and deserves at this time to be fixed. For this reason, I urge the committee to give serious, careful, and thoughtful consideration to the proposals discussed today, for the purpose of restoring legislative practice to the Framers' original vision.

I'd like to echo every statement at this table in that I think the proposals deserve careful scrutiny. They are not ready quite yet to be enacted into law, but I think that this is a very strong beginning to achieve what was started at the time of the framing.

Thank you.

[The prepared statement of Ms. Hamilton follows:]

PREPARED STATEMENT OF MARCI A. HAMILTON, PROFESSOR OF LAW, BENJAMIN N. CARDOZO SCHOOL OF LAW

Thank you, Mr. Chairman, for asking me to testify today on the constitutional aspects of legislative responsibility and the doctrine of non delegation. I commend the Subcommittee for taking up this timely and crucial issue.

Some have asked—quite fairly—what could the Constitution have to say about the state of legislative practice today? The current administrative state, after all, is a result of the New Deal. One might think that this is a contemporary problem unimagined by the colonial generation and the constitutional framers.

In fact, the Framers had a vivid example of an unaccountable bureaucracy before them as they pondered and debated what form of government to give this new and pristine nation. Just as we look back 200 years to understand what the Framers were thinking and doing, many of the Framers, especially those most responsible for our resulting governmental scheme—James Wilson, James Madison and John Witherspoon—looked back 200 years. They looked back to the Reformation era, and specifically to the bureaucratic and unaccountable pre-Reformation Roman Catholic Church.

The Framers crafted the constitutional form of the federal government with the abuses of the Reformation in mind. And they chose a format that echoes the views of Reformation theologian John Calvin. Calvin crafted a system of church government to meet the excesses of the pre-Reformation church. Following Calvin's lead, the Framers set themselves to craft a new form of civil government that would resist tyranny.

Although the Framers firmly believed that legislators were capable of acting in the best interests of the country, they also recognized the temptation of governors to aggrandize their own powers to the detriment of the people. The Framers chose two principal means by which to ensure that the federal government would not become a means of tyranny: First, they decentralized power and distributed it throughout a complex structure which channeled power into three federal branches with distinct powers and into the individual states. To quote Framers John Witherspoon, a Presbyterian minister, President of what is now Princeton University, and mentor to James Madison and James Wilson: Every good form of government should be "complex, so that one principle may check the other . . ."

Two eighteenth-century metaphors nicely capture the checks and balances system chosen by the Framers: one is of a watch, with its cogs working independently but enmeshed; the other is of the planets, each with its own path to follow but held together in the solar system by mutual gravitational forces.

Second, in the second phase of the Constitution's drafting, an explicit Bill of Rights was added to provide explicit protection of recognized spheres of liberty: for example, religion, speech, the press, and the home.

Today, we are discussing the first tack: the designation of certain branches with particular and limited powers. Art. I, sec. 1 of the Constitution provides:

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

In Art. I, sec. 8, the Constitution provides a list of "powers," which includes collecting taxes, regulating commerce, coining money, protecting intellectual property, declaring war and raising armies.

The Framers had a vision of the constitutionally appropriate legislator acting upon these powers. He would be a trustee of the people with independent authority

to make decisions to govern the nation. See Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. Rev. 477, 523-44 (1994). A trustee is obliged to exercise independent judgment on behalf of those he serves. The Framers believed that a representative has a fiduciary duty to engage in independent-minded decision making crafted to best serve the people. David Schoenbrod, in his book *Power Without Responsibility: How Congress Abuses the People Through Delegation*, cogently argues that representatives have a constitutional obligation to make "the hard policy choices" for the people.

The important message I bring here today is that the Framers intended for the members of the House and the Senate to have and to exercise *independent power* to make the hard policy choices for the nation, and a failure to do so violates the constitutional scheme. The American experiment in democracy is not an example of direct democracy in which the people actually make the governing decisions. That model was explicitly rejected by the Framers as unworkable. Instead, they chose a system of representation which charges representatives with the obligation of exercising their independent judgment.

Framer James Wilson, who deserves much of the credit for the representative scheme in the Constitution, is reported to have explained the representative's role as follows:

Mr. Wilson could not approve of the Section as it stood, and could not give up his judgment to any supposed objections that might arise among the people. He considered himself as acting & responsible for the welfare of millions not immediately represented in this House. He had also asked himself the serious question what he should say to his constituents in case they should call upon him to tell them why he sacrificed his own Judgment in a case where they authorized him to exercise it? Were he to own to them that he sacrificed it in order to flatter their prejudices, he should dread the restore: did you suppose the people of Penn[sylvania] had not good sense enough to receive a good Government?

2 James Madison, *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America* 399 (Gaillard Hunt & James B. Scott eds., Prometheus Books 1987) (1920).

It is an indelible feature of the constitutional scheme that legislation is constitutionally legitimate even if it does not reflect the popular will. That feature affords legislators the latitude necessary to make the best decisions, the right decisions. To some extent, the people can hold legislators accountable if they seek reelection. For those representatives who do not, the people have little control over them during the term of representation. The Constitution builds in two features that are intended to keep representatives accountable even though they hold power that is independent of the people: enumerated lawmaking responsibility, which is subject to judicial review, coupled with two-way communication with the people. Delegation disserves both constitutional responsibilities.

The problem we face today is that Congress increasingly has abdicated its constitutionally designated job of making the hard policy choices. Rather than subjecting itself to the political heat of crafting the ruling law, it has increasingly permitted itself to declare broad policy goals in its legislation and to delegate the difficult decisionmaking to unelected officials of the executive or the judiciary branch.

The Constitution's structure, language, and history forbid legislative delegation of policy decisions. The *nondelegation principle* is an important and central constitutional norm which is necessary if representatives are to be held accountable and the government made to work like clockwork, or to revolve like the solar system.

Although the Supreme Court has consistently espoused the constitutional importance of the non delegation principle, it has not held a clear or a strong line on delegation. Indeed, some have claimed that the Court has never invalidated a statute on delegation grounds. But that is an exaggeration. There are two important cases where the Court did so: One is *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and the other is *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), both decided in 1935. In both cases, Congress handed the policy choices directly to the President, providing only the broadest directions. *Schechter Poultry* at 542; *Panama Refining* at 415.

Since those two cases, the Supreme Court has taken a more deferential stance toward congressional delegation, though it has never overruled *Schechter Poultry* or *Panama Refining*, and it has continued to affirm the importance of the non delegation norm. In the Court's most recent delegation case, the Court stated:

Another strand of our separation-of-powers jurisprudence, the delegation doctrine, has developed to prevent Congress from forsaking its duties. . . . The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or entity. *Field v. Clark*, 143 U.S. 649, 692, 12 S.Ct. 495, 504, 36 L.Ed. 294 (1892).

Loving v. U.S., 116 S. Ct. 1737, 1744 (1996). This reaffirmation of the constitutional principle sends an important message to members of Congress at a time when delegation has resulted in a steady erosion of public confidence in the legislative branch; increasing numbers of scholarly works calling for forms of popular self-rule to trump legislative decision making; and a pervasive belief that the problem cannot be fixed, in other words, apathy.

Each of these threatens the integrity of the constitutional order, and the capacity for the Constitution to do that which its eighteenth century drafters believed to be its central mission: to ensure liberty through a smoothly operating, antiauthoritarian, accountable governmental system.

In the American constitutional scheme, the people delegate significant power to legislators to make the decisions that run the country. And we do so for deeply pragmatic reasons: if representatives carry out their duties as trustees of public decision making, the country will thrive as other citizens can pursue careers and avocations that contribute to the polity in other ways. We can have full-time doctors, street sweepers, and chefs. Legislators open the way to freedom for all of us.

But we should only be willing to relinquish the real power given to members of Congress if they are shouldering the burdens that then free us to live our lives secure in the fact that the country is being run smoothly and appropriately. The widespread practice of delegation threatens our pursuit of "ordered liberty."

The Supreme Court is not the only branch of the federal government that has responsibility for carrying forth the requirements of the Constitution. As a coordinate branch in the constitutional scheme, Congress bears equal responsibility to ensure that it conducts its business in a constitutional manner.

Congress must clean its own constitutional house. Congress has tried to take personal responsibility before, but chose a scheme that appeared to the Court to undermine the constitutional power of the President to veto legislation. In the early 1980's Congress attempted to solve its delegation problem by delegating authority to the executive and then retaining a "right to veto" what the executive decided. *INS v. Chadha*, 462 U.S. 919, 921-22 (1983). The Supreme Court declared this an attempt to make an end run around the President's unilateral, constitutional power to veto legislation. *Id.* at 958-59.

The time has come to take a different tack to restore the constitutional order. The proposals brought today could transform the entrenched and constitutionally suspect practice of executive lawmaking into one of legislative lawmaking.

To the extent Congress re-embraces its constitutional responsibility to make the hard policy choices, the constitutional order can be reinstated. Congress could return to the role designated by the Framers. It would be on the front lines for the decisions that affect citizens and the country, thereby giving the people more leverage, more information, and more power. Federal law could lose its Wizard of Oz quality and become a product of accountable, independent trustees.

Conclusion: Two hundred years from now, who will be looking back at us and judging our government? Will the American constitutional system, as it enters its third century, appear more like the unaccountable bureaucracy of the pre-Reformation Roman Catholic Church that motivated many of the Framers, or will it look like the ideal government envisioned by the Framers: a government of liberty and efficiency, running like clockwork, with its various cogs acting independently but turning in tandem with the others so that the whole can produce a unified and productive result? The proposals before the Committee today hold promise for moving us closer to the Framers' original vision.

Mr. GEKAS. We thank the professor for that statement, and the Chair will yield itself such time as he might consume on posing some questions to the panel.

Professor Gellhorn asserted that whatever the Congress should do, it should be selective in the areas in which they ought to delegate or not delegate full authority to the agencies. It seems to me that what Professor Hamilton has just said jives with this. That is, the scrutiny that we ought to invite to these pieces of legislation

could result, we would hope, in selecting those areas in which we could do most good by constraining this delegation of authority.

Mr. GELLHORN, would it be wise to "criteria-ize," if that's a word, the selection process, in being consistent with Mr. Wetstone's testimony, to those that affect public safety and health? For instance, if they affect public safety and health, we should scrutinize less or we should delegate less or more. Or if it's an economic impact, we should delegate less or more. Is that the way we see that the selection process should be made?

Mr. GELLHORN. I would respond initially by saying I commend you for looking for a compromise, a solution, that will bring the disparate voices together. But I don't think the criteria that you suggest are ultimately going to work since, no matter how crafted, they would tend to be so broad as to possibly encompass dozens, hundreds, or virtually all of the legislation that Congress considers because economic regulation often has as part of it safety regulation, and vice versa.

Indeed, Congressman Smith's proposal suggests that the proposal here, the legislative enactment of regulations, should only be for those rules where the authorizing committee has designated that implementation should be subject to this congressional implementation process. While that's attractive at least in taking a first cut at restricting the scope, I don't think it works. I think that, in fact, most authorizing committees would say, "We're competent; we can do it," and, therefore, it would cover most legislation.

The second thing is I don't know whether it would work, and I don't think anybody can tell you that it would work. I do know that delegation, as Professor Hamilton has pointed out, is undesirable, on the one hand, and yet it seems to be the solution that Congress keeps picking, including this Congress. So it suggests to me a different approach, and that is, let's find out if the process can work in a discrete area. When you try a new idea, you try it in a limited, discrete area, and I would say pick a specific subject.

One area of concern is EPA regulation, not all of EPA regulation, but a discrete area of EPA regulation, and see if legislative oversight in this process makes an advance. I think it might, and I think in the process you might learn how it works better, how do you craft your own rules to accomplish it. That pragmatic approach is much better in my view than identifying some criteria that I can't predict in advance would work or not.

Mr. GEKAS. Mr. Wetstone was eloquent in showing that most of the regulations he says that have been promulgated over the last 25, 30, 40 years have been popular. How do you respond to the brick that was brought to our attention by Congressman Taylor?

Mr. WETSTONE. Well, I think that the way to deal with these problems—and I think that's a good example—is to amend the laws under which the rules are being issued and those are the laws that provide the authority. The agencies are very clearly limited in terms of what they can do by the directives that are in the authorizing law. And if you're going in the direction that Professor Gellhorn suggests—and I think that is a good direction—then really where that takes you is very close to simply saying: identify the laws that are the problems and grapple with those problems, because I do believe that a sweeping effort to deal with the brick

problem is going to create a whole bunch of other problems that are much more widespread and serious.

Mr. GEKAS. Would you defer to the ombudsman theme that is undertaken by Members of Congress to deal with that? In other words, a little construction firm in my area is hit with the brick problem. So they call me, and I should just try to work it out with the agency. Is that what you're saying? Forget the delegation problem?

Mr. WETSTONE. No, I'm suggesting, rather, Mr. Chairman, that OSHA should be revised in terms of the authority that's granted the agency to deal with that kind of problem. I would point out that the brick regulation as was read, is extremely dumb, but not harmful to anyone. I mean, you know, telling people who manufacture bricks what a brick is is obviously ridiculous. On the other hand, it doesn't hurt them.

Mr. GEKAS. Well, how do you know that? Any new forms they have to fill out or some lawyer that they have to hire or some administrator, some bookkeeper, that adds to their expense does impact upon them. We have hundreds of anecdotes of that type. I just wanted you to know that.

Mr. WETSTONE. I would venture that many of those are just that, anecdotes, and in the environment area we heard many things. We heard about OSHA requiring holes in buckets and stories and stories of—

Mr. GEKAS. The anecdotes match those volumes over there, therefore, making them more than anecdotes. I misspoke—not anecdotes; it's a history.

But, anyway, my time has run out in this first round of questions. We'll get to—

Mr. SCHOENBROD. Mr. Chairman, could I respond to that question?

Mr. GEKAS. Certainly.

Mr. SCHOENBROD. I think you're right; I think it's true that the goals of these laws are popular. Clean air is popular. Minimizing job loss from clean air regulation is popular. What's unpopular is the bureaucrats, and I think we have to consider why the goals are popular and the bureaucrats are not. The reason is that, with the best of intention, Congress structures the laws so it embraces the popular goals and then asks the agency to reconcile these irreconcilable goals to make, in effect, bricks without straw. And the upshot, of course, is the kind of legislative paralysis and bureaucratic paralysis that leaves health unprotected, that leaves business unsure of its obligation, and so on.

Now I think that, given the political incentives, this type of paralysis is going to continue to take place unless Congress manages to kind of give up the political advantages of delegation by saying, "No, we're going to make the hard choices." And the fact is that if Congress has to decide the question of what kind of law there should be limiting lead in gasoline. Some folks are going to say there ought to be less and some are going to say there's going to be more, so that the choice will in fact be hard. But in the long run, for Congress to make that choice is best for your constituents. Otherwise, the bureaucracy grinds on and on and on.

Mr. GEKAS. We now yield to the gentleman from Georgia, if he wishes to pose any questions to the panel, 5 minutes.

Mr. BARR. Thank you, Mr. Chairman.

I've been reading through some of the written testimony here; I got here late and wasn't able to benefit from all of the oral remarks. Do all of you agree that looking at this legislation is a good idea, that it represents a move in the right direction, even if you all disagree to some extent on the precise details, maybe how far it goes, but does everybody agree that it's a good idea to begin looking at this process and begin trying to get things back in balance?

Mr. GELLHORN. I think that I would dissent if we interpret that as: do we need to have a broad change in the Administrative Procedure Act to authorize this on a wide scope? I think it's a good idea to rethink the structure of Government at times and a good idea to ask ourselves seriously what is the appropriate role that Congress can fill and how far it can go. I think it would also be a good idea to experiment, to see if Congress can fill this role in a different fashion, but I do think it important that we not make an effort to make a broad leap before we know what's on the ground when we land.

Mr. WETSTONE. I agree and then some. I do feel that this is not the right direction, not a constructive direction to be moving. If there are problems in these laws, then the problems should be addressed, and we always have the authority—and Congress does now—to do what Mr. Schoenbrod just suggested. Congress could always go out and simply say: phase lead out of gas. They had the authority in 1970; they had in 1990, when in the end they did it—to the credit to all of you—and that authority is not something that would be created by this proposal. I think this approach is going to create a huge number of problems, and I would point out that restraining bureaucracy may sound good, but when the Government was closed down, that proved unpopular, and I think this would be an extension of that, and a permanent one—

Mr. BARR. Not in my opinion.

Mr. WETSTONE. OK. [Laughter.]

Mr. JERRY TAYLOR. Let me, if I can, comment for a moment.

Mr. BARR. I didn't want to stop you from what you were saying, but not in my district, in some places maybe, but was there something more you wanted to say?

Mr. WETSTONE. Well, only just this: the laws that are problems should be identified and addressed, and that's really the way to deal with them, and Congress should take responsibility for the legislation under which these rules are issued.

Mr. JERRY TAYLOR. If I can for a moment, let me dissent a bit from Mr. Gellhorn's remark. He enjoins us to rethink the appropriate role of Congress carefully and to consider what's appropriate for Congress to do. Well, happily, that was done for us 200 years ago when this Government was established. The appropriate role for this Congress is clear. It is to author the law. The appropriate role for the executive branch is clear. It is to enforce the law. And the appropriate role for the judiciary clear. It is to interpret the law. That is that. Any rethinking beyond that largely-established and textbook civics course is something that is appropriately done through a constitutional amendment.

The problem in delegation is that Congress has figured out a way to circumvent the separation of powers, and I believe it was not done because the executive branch stole in in the middle of night and grabbed the power from Congress. Clearly, that's not the case. What has happened is, as Mr. Schoenbrod has quite ably pointed out, that Congress has found ways to gain political advantage by passing the virtual equivalent of goodness and niceness laws and then delegating to the bureaucrats the job of determining how to enforce the goodness and niceness laws, so that they gain—

Mr. BARR. Would an appropriate term to describe that be abrogation?

Mr. JERRY TAYLOR. Absolutely. I think that would be appropriate.

So in that regard, when Mr. Gellhorn suggests being careful and trying to test this here or there, I have trepidations on two grounds. One, the Constitution is not selective towards depending upon what the aim of legislation is; it's rather clear. I believe the idea behind Montesquieu and Locke and others who wanted separation of power is timeless and it does not expire because they did.

And, finally, I would certainly suggest that it allows Congress to selectively be accountable. Congress should not selectively be accountable. The example Mr. Gellhorn used in his testimony—I'm not sure if you caught it or not, if you were here at the time or not, but it was an appropriate one—was the recent FDA rule by Mr. Kessler which would restrict access to cigarettes on the part of the teenagers and advertising. And he mentioned that there were some 1,000 pages of documents submitted by FDA with that rule, and this is a class example of something Congress might not want to have gotten into. Well, virtually every newspaper I read an account of that law, of that regulation, calls this the most important, sweeping public health initiative ever initiated by Government.

Mr. BARR. The most important what?

Mr. JERRY TAYLOR. The most important and sweeping health initiative ever initiated by Government. I will not quibble with that, although I'm sure some people could.

That having been said, if it's an important and sweeping initiative never before undertaken by government, you folks were elected to do those sorts of things, not the President, and this is an example where Congress should not selectively be allowed to say to various constituencies—

Mr. BARR. Nor Mr. Kessler.

Mr. JERRY TAYLOR [continuing]. Nor Mr. Kessler. If Mr. Kessler wants to initiate such programs, I recommend that he do like you and run for office and ask for voters' approval.

Ms. HAMILTON. Can I add just a short footnote to that?

Mr. BARR. Yes, please. Well, with the chairman's permission.

Mr. GEKAS. We'll so indulge.

Ms. HAMILTON. Thank you.

I'd just like to note that Professor Gellhorn's and Mr. Wetstone's objections are identical, and they are basically objections to the numbers of regulations that will be coming back to Congress. In my view, that is simply a clear indictment of the current situation. The numbers of regulations are high because delegation has run riot.

And so I would not endorse Professor Gellhorn's solution that you try it out in one area. Rather, I would suggest that, if the numbers are that scary, perhaps try to find a way to review very important or major or significant—whatever term you want to use—regulations, if a definition for that could be found.

But just let me add, the hope of these sorts of proposals is that the number of regulations will be reduced because the administrative branch will be scared that everything they do is now going to be reviewed by people who represent the people, and so the hope would be that we'd have fewer regulations as a result of these proposals and not the same number that we have now that are unreviewed, unreviewable, and causing the constitutional problem that we have.

Mr. BARR. Thank you.

Mr. SCHOENBROD. Could I also answer, Mr. Barr?

Mr. GEKAS. Certainly.

Mr. SCHOENBROD. Thank you.

I agree that the objective ought to be to end delegation. As to exactly how we get there, I think there's room for disagreement. I appreciate Professor Gellhorn's cautious spirit. But under Congressman Hayworth's bill, with the expedited process, a lot of these things would not be debated; they would just be voted on.

I want to emphatically disagree with Mr. Wetstone that Congress need not end delegation because it can of course, always has to, in fact, enact legislation when it wishes. His suggestion is not sufficient because of the political reality that, where it's a choice between making a hard choice and promising the best of everything to everybody Congress is likely to delegate. That's why we are where we are today.

Mr. BARR. It's not a—historically, it's not a question of likely to; that's what they've been doing for 40 years.

Mr. SCHOENBROD. Exactly.

Mr. BARR. Thank you.

Mr. GEKAS. The House bills have preempted the committee gavel. We want to thank all the members of this panel for their testimony. I, for one, appreciated it personally, and professionally of course, but I tell you this: I can't forget that brick. [Laughter.]

Thank you very much. This meeting is adjourned.

[Whereupon, at 11:28 a.m., the subcommittee adjourned.]

○

ISBN 0-16-053842-4



9 780160 538421

